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87-1808

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

JOSEPH N. GRANO, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In awarding attorney's fees under 42 U.S.C. § 1988, may a court ignore whether plaintiffs' action advanced civil rights

1) by ruling the plaintiffs' claims had to be *deemed* meritorious when mooted, even where defendants never acquiesced in those claims and plaintiffs sought to moot them; or

2) by refusing to deny fees under the special circumstances doctrine where defendants were faced with conflicting constitutional claims and acted consistently with the stronger claims, on the ground that application of the doctrine would permit inquiry into the merits of plaintiffs' claims?

PARTIES

In the court of appeals, the defendant-appellants were Marion S. Barry, Jr., Carol S. Thompson, and Patricia Cooper-Morrison, all District of Columbia officials in their official capacities.

The intervenor-appellants were Oliver T. Carr, Jr. and George H. Beauchert, Jr. The plaintiff-appellees were Joseph N. Grano, Jr., Geraldine Linder, Louis Raymond Perkins, Catherine Van Wyck-Corboy, Dawn M. Eichenlaub, John F. Hacket, Kathryn A. Eckles, Deborah Hanrahan, Carolyn Adger, Anne P. Swearingen, Kenneth I. Rothschild, Thomas E. Lodge, Jr., Bernard Krug, John Straken Hazell, and Carol Currie.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marion S. Barry, Jr., the Mayor of the District of Columbia; the District of Columbia; and several of its officials, petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The May 4, 1984 decision of the United States Court of Appeals for the District of Columbia Circuit, principally deciding merits issues, is reported at 236 U.S. App. D.C. 72, 733 F.2d 164. (App. 20a-29a) Its decision in the first attorney's fee appeal on February 21, 1986, is reported at 251 U.S. App. D.C. 289, 783 F.2d 1104. (App. 1a-19a) Its decision in the second attorney's fee appeal on November 6, 1987, is not reported. (App. 30a-35a)

The United States District Court for the District of Columbia issued opinions on September 1, 1983 (App. 53a-62a); on February 12, 1985 (App. 45a-52a); and on August 27, 1986 (App. 37a-44a). The opinions are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1987. (App. 30a-31a)

This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1983, 1985 and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

STATEMENT

The plaintiffs (respondents here) are a group of citizens of the District of Columbia who sought to preserve the Rhodes Tavern, a building which stood at the northeast corner of F and 15th Streets, N.W. in Washington, D.C. and had been built in 1798 or 1800. Plaintiffs lost in this effort after extended proceedings and litigation before agencies and courts of the District of Columbia, and the Court refused to review the local court's judgment. *Citizens Committee to Save Historic Rhodes Tavern v. District of Columbia Department of Housing and Community Development*, 432 A.2d 710 (D.C. 1981), *cert. denied*, 454 U.S. 1054 (1981). The local litigation established the Tavern owner's entitlement to a demolition permit for the Tavern upon approval of plans for new construction on the site.

Plaintiff Grano then proposed initiative legislation which, while it would not by its terms provide for the Tavern's preservation,[1] would establish an unpaid advisory committee to make efforts to preserve the Tavern. In the meantime, the Tavern's owner became entitled to a demolition permit when local agencies approved plans for new construction. Plaintiffs then brought this lawsuit in district court seeking to enjoin the District from "the issuance of a demolition permit allowing destruction of the subject matter of the initiative: Rhodes Tavern . . . ." Complaint 1. They also requested that, if the initiative passed, the injunction continue in force "pending the completion of the procedures provided for in Initiative No. 11 . . . ." *Id.*, 19. There was no time limit on those "procedures." Indeed, there was no circumscribed limitation of any type placed on them, since one provision of the initiative, Sec. 4(4), authorized the advisory group to "undertake any other activities which it determines are appropriate. . . ." Thus, this litigation was an attempt to get the federal courts to do what the legislation itself was carefully tailored not to do expressly: preserve Rhodes Tavern for a lengthy and indefinite period.

When plaintiffs brought this action, the owners of Rhodes Tavern had satisfied all the requirements for demolition provided under local law, and thus had an enforceable right to have the District issue a demolition permit to them. See *Commissioner of the District of Columbia v. Benenson*, 329 A.2d 437 (D.C. 1974) (affirming injunction ordering issuance of a demolition permit for the Willard Hotel). Therefore, the owners had acquired a property interest and the government could

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[1] It if had done so, because that would have required "just compensation", it probably would have rendered the initiative invalid under the Congressional legislation granting the District self-government, as a "law appropriating funds." See *District of Columbia v. Jones*, 481 A.2d 456 (D.C. 1984).

not deprive them of it without paying just compensation. See *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977) (holding that United States must compensate owners of Willard Hotel because statutory moritorium requiring its preservation, enacted after owners had satisfied all requirements for demolition permit, constituted an unlawful taking violative of the Fifth Amendment). Indeed, even a delay in issuing the permit could violate the owner's constitutional rights. See *Silverman v. Barry*, 234 U.S. App. D.C. 22, 727 F.2d 1121 (1984) (31-day delay in issuing certificate permitting owners to convert property to condominiums may infringe owner's constitutional rights). Accordingly, the District had no legal basis for denying the owners a demolition permit.

Plaintiffs asserted that, if the District issued the demolition permit, it would interfere with their constitutional rights, principally their right to a "meaningful" vote. The district court adopted this argument and ruled for plaintiffs because "[t]he right to participate effectively in that [initiative] process, must be protected." Memorandum Order, September 1, 1983 at 12 (App. 62a). On this basis, the district court enjoined the District from issuing a demolition permit prior to the election, and also, if the initiative passed, from issuing a demolition permit "until the procedures contemplated in Initiative No. 11 for the preservation of the Rhodes Tavern are concluded." Judgment and Order, September 1, 1983 at 2, (2) (App. 67a-68a).

The District of Columbia appealed, essentially for two reasons. First, the District believed that plaintiffs were misusing the federal courts in a way that might substantially interfere with the functioning of the local government. The District believed that the district court had established a new right, "a right by persons advocating a change in law to preserve the status quo pending their efforts to secure the change." Appellant's Br. in No.

83-1975 at 11. The District was concerned that this "right" could permit any well-organized group to prevent for months, or even years, government conduct—such as a sale or purchase of land—or private conduct for which a government license is required—such as converting an apartment to condominiums—by the same tactic of proposing an initiative and then bringing suit purportedly to ensure an "effective" vote on the matter. *Id.*, at 12-15. Furthermore, the District was convinced that no such right to preserve the status quo is secured by the Constitution; the constitutionally-protected right to vote, secured by the 15th Amendment, is the right to be free from discrimination in voting. *Id.*, at 16-24.

Second, the District was concerned that the Tavern's owners might recover "just compensation" from the District for any delay in issuing the demolition permit. That risk was clearest from the court's post-election injunction. That injunction would essentially enforce a local law, the enacted initiative, (or at least the district court's interpretation of it) against the owners. The delay which would be involved would be substantial and was unlimited. The District was also concerned, however, that it might be held financially liable for any pre-election delays. Plaintiffs were arguing that these were directly attributable to the District's election laws, and to the action of its Board of Elections and Ethics in certifying this initiative. See Plaintiffs' August 16, 1983, opposition to defendant's motion for summary judgment, at 9-12.

This action was filed on August 3, 1983, and the district court expedited its proceedings and decided the case in less than 30 days, issuing its injunction on September 1, 1983. Since the election was scheduled for November 8, 1983, the expedited proceedings in the district court gave the court of appeals more than 60 days to decide any appeal. The District filed its brief on the merits in the court of appeals on September 16, 1983,

together with a motion for summary reversal and a motion to expedite consideration of the appeal so that it would be decided prior to the election. On September 21, 1983, plaintiffs filed oppositions to both motions. In their opposition to the motion to expedite (at 2, 6) they argued, among other things, that they could not respond to the District's 31-page brief in less than 30 days, and that the election might moot the entire case. Their opposition to summary reversal specifically suggested (at 6) that, if the initiative were to be enacted, the issues appellants raised could not be resolved in that case.

The court did not respond to the District's motions. Accordingly, plaintiffs took their full 30 days and filed their brief as appellees on October 17, 1983, and the District obtained it the next day; on October 19, 1983, the District lodged with the court of appeals, a motion for immediate decision, emphasizing (at 3) that "appellees are arguing that, after the election has been held, this Court will not be able to resolve the question of whether the District Court properly enjoined the government from acting pending the election." On October 21, 1983, the Court denied the motion for summary reversal. A week later, on October 28, 1983, the Court issued an order stating that "appellant's motion for expedited decision filed October 24, 1983 * * * is denied." As noted, that motion was filed together with the District's brief on September 16, 1983, and responded to by appellees on September 21, 1983.[2]

On the first appeal, the court of appeals held that the District's challenge to the pre-election injunction was moot, but vacated the post-election injunction. Citing

[2] Our September 16, 1983 motion to expedite had apparently been mislaid at the Court and was not relocated until late October. (App. 35a) Since the election was then only 2 weeks away, it is not surprising that, at that late date, the court did not grant the motion.

Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981), the court stated that mootness did not foreclose an attorney's fee award. *Grano v. Barry*, 733 F.2d 164 (D.C. Cir. 1984) (App. 26a, n.2). Thereafter plaintiff filed an action in Superior Court, which granted the District's and the owners' motions for summary judgment on the ground that, on its face, the initiative law constituted an unconstitutional taking. *Citizens Committee to Save Historic Rhodes Tavern v. Barry*, Civ. Action No. 6833-34 (D.C. Sup. Ct., Aug. 20, 1984). The District of Columbia Court of Appeals stayed that order on condition that plaintiffs post a $100,000 bond by September 4, 1984. When they did not do so, the stay was vacated and the Tavern was demolished.

On remand, the district court awarded plaintiffs attorney's fees for their work on the pre-election injunction, but not for their work on the constitutional validity of the initiative. The district court also found that the plaintiffs had prevailed on the issue of expedited review in the appeal, and that the denial of expedited review "effectively decided the right to vote issue in plaintiffs' favor." (App. 49a) The court awarded $53,579.47 in attorney's fees. (App. 64a) The District again appealed.

The court of appeals affirmed in part and remanded for reconsideration in part. *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986). (App. 1a-19a) It held that plaintiffs were prevailing parties because "they succeeded in ensuring that the voting would take place while Rhodes Tavern still stood and the initiative still had the *potential* to mean something." *Id.* at 1109 (App. 8a) (emphasis in original). The court further held that it would not determine whether the constitutional claims plaintiffs asserted were sufficiently meritorious to warrant fees, because it was only necessary to do so "when there has never been any *judicial* determination whatsoever on

the merits." (App. at 11a; emphasis in original).[3] This was because "once a court has already ruled that the claims are actionable--not just colorable—civil rights claims, the question of whether the party meets the statutory requirement of having prevailed on the basis of 'civil rights' claims has been unequivocally answered." *Id.* at 1111. (App. 12a)

The court of appeals also observed that the District argued:

> [n]o matter which course it followed—granting or withholding the permit—either the plaintiffs or Carr [the owners] would have claimed it was acting unconstitutionally. In such a squeeze play, it argued, it would not be equitable to assess attorneys' fees against it. Finally, the District and intervenors argued that the Superior Court's holding that the initiative violated a *third party's* rights, certainly constituted special circumstances. *Id.;* emphasis in original.

(App. 14a) The court recognized that the district court had implicitly rejected the argument (*id.*), but remanded with the admonition that "a district court should set forth its reasoning for concluding that special circumstances do not exist." *Id.* at 1112. (App. 15a)

The court affirmed the award of fees to plaintiffs for their work on appeal because they had successfully argued that the pre-election injunction issue was moot; affirmed the district court's ruling that no fees were awardable against the owners; and asked the district court to explain why, since it did not award fees to plaintiffs for arguing the constitutional validity of the initiative, it did award fees to them for arguing that the initiative was valid under local law. (App. 17a-19a)

[3] The court characterized our argument as urging that "the frivolous test should be applied. . . ." *Id.* (App. 11a) That misread our argument. In fact, we argued that, because plaintiffs' conduct contributed to mooting the pre-election issue, to obtain fees on that issue, "plaintiffs must be required to show that . . . the claim asserted states a cognizable constitutional violation." See our brief in No. 85-5264 at 20. We further argued, "However, . . . their claim should be rejected even under the more lax non-frivolous standard . . ." *Id.* at 21.

On remand, the district court stated that its mandate was to set forth the reasons for its previous, implicit conclusion that there were no special circumstances here. Memorandum Op., August 27, 1986, at 4. (App. 39a) It then held that there were no special circumstances here because 1) plaintiffs secured a practical benefit, namely, that "the electorate be heard in a meaningful manner" (*id.* at 5) (App. 40a); 2) the District did not have to oppose plaintiffs' efforts to enjoin issuance of the permit but "could have sought a declaratory judgment" (*id.* at 6) (App. 41a) or have simply delayed 8 months in issuing the permits (*id.*) (App. 41a); and 3) the Superior Court's holding that the initiative law was unconstitutional was not relevant because the Superior Court did not decide what the District had to decide, *i.e.*, how to "balance[] two sets of constitutional rights (the right to vote and the right to due process. . . . (*Id.*) (App. 41a-42a) The court awarded $21,173.57 in additional attorney's fees. (App. 63a)

The Court of Appeals again affirmed in an unreported decision.[4] (App. 32a-35a)

REASONS FOR GRANTING THE WRIT

1. This case shows that, in cases where a plaintiff's purported civil rights claim has mooted, the practice of the courts in granting attorney's fees under 42 U.S.C. § 1988 has broken entirely free of what should be its

[4] The Court of Appeals erroneously characterized its previous decision as finding that plaintiffs had asserted a non-frivolous claim on the merits. (App. 32a) Instead, that decision held that the district court's judgment, which was vacated for mootness, conclusively established that the claim was not frivolous. (App. 10a-12a).

anchor: the congressional purpose of advancing civil rights. This is a case where a plaintiff was awarded fees under § 1988 for asserting claims which, we submit, clearly do *not* state valid civil rights claims: claims that the Constitution secured for them a right to maintain the status quo pending a vote on whether a particular local initiative should become law. The initiative was designed to require the preservation of one historic building. If enacted, it presented a clear threat to the building owner's constitutional right against a government taking without compensation. Thus fees were awarded to the plaintiffs here, not only for advancing apparently non-existent federal civil rights, but despite the fact that this action was designed to thwart the constitutional rights of others.

The court of appeals precluded any inquiry into whether plaintiffs were in fact asserting valid civil rights claims, holding that the mootness of those claims required that they be considered valid for purposes of awarding fees under § 1988. The court also held that, although the local government was faced with competing constitutional claims here, the special circumstances exception to awarding fees should *not* be shaped to require a defendant to evaluate those claims and act consistently with the stronger. This, too, was impermissible because it would permit an inquiry into the merits of plaintiffs' claims. This refusal to look at whether civil rights were in fact being advanced here is inexplicable.

The Court must make it clear to the courts of appeals, that, in purported civil rights actions which moot, an inquiry into whether the claims asserted were in fact claims under the Constitution or civil rights laws is not irrelevant, as the court of appeals held here; it is vital. The courts of appeals must be brought back to the fundamental principle that fee awards in these cases are intended to promote civil rights.

2. The court of appeals ordered that attorney's fees be awarded to the plaintiffs under 42 U.S.C. § 1988 when, in

the circumstances here, there was no assurance that plaintiffs had forwarded constitutional rights. The court did so by standing mootness doctrine on its head; by holding that, because plaintiffs' constitutional claims had mooted, on the attorney's fee issue, it was conclusively established that those claims had merit.

By awarding fees in these circumstances, the court of appeals has eliminated any requirement that fee awards be justified by reference to the purposes of § 1988. By awarding fees on this rationale, the court has sown confusion as to the effect that can be given a decision that has mooted.

a. Plaintiffs' asserted voting rights claims became moot despite defendant's efforts, not because of them. Instead, it was plaintiffs' conduct that contributed to mooting their claims. They did everything they could to avoid an authoritative resolution of the "right to an effective vote" claims by the court of appeals; first insisting that there could be no expedited appellate resolution, and then arguing that their claims were moot.[5] In these circumstances, there was no acquiesence by the defendants as to the validity of plaintiffs' claims, as may be inferred from the action of defendants in discontinuing conduct challenged as unconstitutional or in settling constitutional claims. Nevertheless, the court of appeals held that, to establish entitlement to fees under § 1988, the plaintiffs here had to show even less than do plaintiffs who have secured settlements or caused the challenged conduct to cease. This was error. If fees are awardable under § 1988 where the asserted constitutional claim moots without acquie-

[5] The plaintiffs here sought and obtained expedition in the trial court and fully litigated their case in less than 30 days. That left 68 days before the initiative vote for the Court of Appeals to decide the case on the merits. On appeal, however they opposed expedited consideration and/or a summary disposition. When those tactics produced the delay they urged, they successfully argued that the case was moot.

scence by the defendant, as a precondition to recovery, the plaintiffs should be required to show that the claims they asserted do in fact state a constitutional claim sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b). Only such a showing provides sufficient assurance that the grant of fees serves the purposes of § 1988 and is therefore proper under that statute.

(i) By its terms, 42 U.S.C. § 1988 requires that a plaintiff be a "prevailing party" to obtain an attorney's fees. Relief need not be judicially awarded to justify a fee award.

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, —— U.S. ——, ——, 107 S.Ct. 2672, 2676 (1987), citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980). See also, S. Rep. 94-1011, 94th Cong., 2d Sess. p. 5 (June 18, 1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. p. 7 (Sept. 15, 1976). In cases of voluntary action by a defendant who complies or acts under threat of lawsuit, "such compliance, although mooting the lawsuit, shows acquiescence in plaintiff's position." *Kay v. David Douglas School Dist. No. 40*, —— U.S. ——, 56 U.S.L.W. 3481 (Jan. 19, 1988), (White J. dissenting from the denial of certiorari), citing *Martin v. Heckler*, 773 F.2d 1145, 1148-1149 (11th Cir. 1985) (en banc); *DeMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982); *Hewitt v. Helms*, *supra* ("[I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed.")

(ii) Where a defendant's voluntary action moots a case, the weight of authority holds that § 1988 requires a plaintiff to show factually that the lawsuit acted as a

catalyst to cause the defendant's changed conduct or willingness to settle, and to show legally that his claims are meritorious. M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees* § 15.13 at 352-354 (1986); 1 M. Derfner & A. Wolf, *Court Awarded Attorneys Fees*, § 9.02[4][b] at 9-20.1 (1986). The leading case holds:

> Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judically determined that defendants' conduct, however beneficial it may be to plaintiffs' interest, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978).[6] The district court's determination of the legal sufficiency of plaintiff's claim is a question of law that a court of appeals must review *de novo*. *E.g.*, *Miller v. Staats*, 227 U.S. App. D.C. 299, 305, 706 F.2d 336, 342 (1983).

This test flows directly from the purpose of § 1988, which is to permit private *enforcement of the civil rights laws* by individuals who often lack the financial resources to do so. H.R. Rep. No. 94-1558 *supra* at 1; S. Rep. No. 94-1011 *supra* at 4. "[U]nless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have 'enforced' the civil rights laws or to have promoted their policies for the benefit of the public at large." *Long v. Bonnes*, 455 U.S. 961, 967 (1982) (Rehnquist, J. dissenting from denial of certiorari).

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[6] The District of Columbia, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have adopted the *Nadeau* test. See M. Schwartz & J. Kirklin, *Section 1983 Litigation supra at* 354 (collecting cases).

(iii) Where a defendant's voluntary conduct has produced mootness, most courts of appeals require only a limited legal showing: a plaintiff is only required to show that his fee-generating claim is not "frivolous, unreasonable, or groundless" or is "at least . . . colorable." *Nadeau v. Helgemoe, supra* 581 F.2d at 281. However, such a limited legal showing is required because the factual showing also required—that the lawsuit caused the defendant to provide the relief sought—provides additional assurance of the merit of plaintiff's claims. Such voluntary actions under the pressure of the lawsuit show acquiescence in plaintiff's position and therefore are "the proper equivalent of a judicial judgment." *Hewitt v. Helms, supra* 107 S.Ct. at 2676.

(iv) There is no similar acquiescence in the plaintiff's legal position where, as here, a defendant strenuously opposes the plaintiff in litigation and does what he can do to seek a decision on the merits before the case becomes moot. There is simply no principled basis on which a vacated judgment in these circumstances can be "the proper equivalent of a judicial judgment." That is especially so in this case, where the plaintiffs sought to avoid an authoritative determination as to whether their claim had merit by engaging in tactics designed to moot the issue. Just as acquiescence by a defendant gives assurance as to the strength of plaintiffs' claims, such evasive conduct by plaintiffs provides reason for doubting that the claims they are asserting have substance.

(v) The court of appeals in this case, however held that, because the district court had ruled in favor of plaintiffs' constitutional claims, the court of appeals need not even inquire as to whether plaintiffs' claims were "colorable"; that question "has been unequivocally answered." (App. 12a) Thus, while a court of appeals will review a district court's assessment of "colorability" or "non-frivolousness" where a defendant has voluntarily ceased the challenged conduct, under the decision below,

there is *no review* of the district court's ruling that plaintiff has a claim if the issue moots on appeal despite the defendant's efforts to have it decided. That makes no sense.[7]

(vi) A plaintiff should certainly be required to make a stronger showing that his claim had merit when the defendant has not acquiesced, rather than the weaker showing required by the court below. Where, as here, plaintiff's conduct in seeking to have his claims mooted gives grounds for doubting the validity of those claims, we submit that there is not sufficient assurance that his action serves the purposes of § 1988 to warrant a fee award unless the Court requires a showing that the claims asserted could have withstood a motion to dismiss for failure to state a claim.

b. The decision below stands the mootness doctrine on its head. Certainly, if mootness prevents a defendant from challenging a judgment, a plaintiff should not be able to rely upon that vacated judgment to obtain attorney's fees. Mootness doctrine requires an appellate court "to reverse or vacate the judgment below and remand with a direction to dismiss" when a civil case becomes moot on appeal to insure that "none [of the parties] is prejudiced by a decision which in the statutory scheme was only preliminary." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); see also *Preiser v. Newkirk*, 422 U.S. 395, 403-404 (1975). The decision below is at war with this doctrine, because the decision was that the vacated injunction not only "prejudiced" the defendants in the attorney fee litigation, it conclusively established that plaintiffs' claims had sufficient merit to warrant fees.

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[7] In the third appellate decision in this case, the unpublished decision, the Court suggested that its earlier, published decision had found that plaintiffs' claims "are not frivolous." (App. 32a) We submit that the published precedential decision is simply not subject to that reading. The published decision takes great pains to explain why there need be no inquiry into "colorability". (App. 10a-12a)

3. The court of appeals also disregarded the purpose of § 1988 in refusing to hold that there were special circumstances here which precluded an award of fees.

A plaintiff is not entitled to attorney's fees under 42 U.S.C. § 1988 where "special circumstances would render an award unjust." S. Rep. No. 94-1011 *supra* at 4; H.R. Rep. No. 94-1558 *supra* at 6, both quoting *Newman v. Piggie Back Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The Court of Appeals construed this exception to awards of fees in an impermissibly narrow way that does more to deny than to advance constitutional rights.

a. District officials were faced with the competing, mutually exclusive constitutional claims of private citizens. They assessed the relative strengths of the competing claims and acted in accordance with those that appeared (far) stronger.

Plaintiffs took an extreme and wholly unwarranted view of the scope of their rights under the First and Fifteenth Amendments. They asserted that the Constitution required District officials to treat the legislative initiative that was pending before the voters as if it were law rather than a mere proposal. They argued that the District was required to refuse performance of the ministerial function of issuing permits that the owners of Rhodes Tavern had met all requirements for under local law—to freeze the *status quo* so that the legislative proposal would have the effect its sponsors intended should it become law. Similar claims have been uniformly rejected. *Canfora v. Olds*, 562 F.2d 363, 364 (6th Cir. 1977); *Hoboken Environment Committee v. German Seaman's Mission*, 161 N.J. Super. 256, 391 A.2d 577, 579, 584 (1978); *Galich v. Catholic Bishop of Chicago*, 75 Ill. App. 3d 538, 394 N.E.2d 572, 577-578 (1979), *cert. denied*, 445 U.S. 916 (1980). The Constitution simply does not require local officials to give substantive force—the force of law—to something that is only a legislative proposal under local law.

They also argued that they had a constitutionally-secured right to a "meaningful" vote on the initiative. However, there is no "right to vote" involved here. The governmental action in issuing the demolition permits here did not regulate voting. Governmental action which indirectly affects voting does not give rise to a constitutionally-secured right to vote. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982).

The assessment that plaintiffs' claim lacked merit was given added force in later, related litigation in the District of Columbia courts, which held that the initiative proposal was unconstitutional. The Superior Court granted the District's and the owners' motions for summary judgment on the ground that, on its face, the initiative law was an unconstitutional taking. *Citizens Committee to Save Historic Rhodes Tavern v. Barry*, Civ. Action No. 6833-84 (D.C. Sup. Ct., Aug. 20, 1984). The judgment in that case established that the right plaintiffs asserted was a right to vote on an unconstitutional initiative.

By contrast to plaintiffs' claims, it is very clear under local law that the owners of Rhodes Tavern had a property interest in the immediate issuance of the permits and that the delay plaintiffs sought would have denied the owners' constitutional rights. When an owner has met all of the regulatory requirements for issuance of demolition and building permits, District officials have a ministerial duty to issue them. *Commissioner of the District of Columbia v. Benenson*, 329 A.2d 437 (D.C. 1974). A permanent deprivation of demolition and building permits is a taking for which just compensation must be paid. *Benenson v. United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977).[8] And a temporary refusal to issue per-

[8] Plaintiff's argued essentially that *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) overruled *Benenson*. *Penn Central*, however, specifically did not concern a law directed to one individual property and property owner. See 438 U.S. at 134-135 & n.32.

mits for which an owner has qualified states a claim of deprivation of property without due process of law. *Cf. Silverman v. Barry*, 234 U.S. App. D.C. 22, 727 F.2d 1121 (1984) (31 day delay).

b. The actions of District officials in this case do not warrant an award of attorney's fees. Those actions were based on the evaluation of the conflicting claims and are consistent with the meritorious ones. They were in accord with the duty of government officials to uphold the Constitution and to honor constitutional rights, and they advanced constitutional rights and the policies of 42 U.S.C. § 1988. The court of appeal's ruling that a party faced with conflicting constitutional claims cannot escape fees by acting consistently with the stronger claims will encourage indifference by defendants faced with such conflicts as to relative merits of the claims, which undermines rather than advances, constitutional rights.

c. The courts below awarded fees in part because District officials took an active part in this litigation. (App. 33a, 41a) District officials did not choose to enter this litigation; they were sued by the plaintiffs. The courts stated that the District could have avoided paying fees by filing a declaratory judgment action that sought a judicial declaration of the rights of the parties rather than permitting its officials to make an assessment of those claims. (App. 33a, 41a) Procedurally it is not clear who the District government would sue in an action seeking a declaration of the rights of its electorate concerning the issuance of the permits involved here. Nor did the courts explain how the attorney's fee result in this case would be changed if the electorate chose to counterclaim under the civil rights laws.

d. The district court also indicated that the District government could have avoided the legal fees ordered here simply by refusing to issue the permits until after the election. (App. 41a) That statement missed the point of our argument. Had that been done, the Rhodes Tavern owners would have a viable lawsuit against the

District under recent circuit precedent holding that any such refusal to issue permits states a claim under the Due Process Clause of the Fifth Amendment. *Silverman v. Barry, supra* (31 day delay). In any event, such action would also probably have generated a lawsuit from the plaintiffs, because they asserted a constitutional right to delay issuance until all procedures contemplated by the initiative were completed, and not merely until the election.

* * * *

The court of appeal's ruling with regard to "special circumstances", like its approach to whether plaintiffs here asserted a constitutional claim, considered irrelevant whether granting these fees advanced civil rights. That inquiry is always relevant, and should be critical, to all efforts to secure fees under § 1988. That fundamental principle must be reemphasized.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5264

JOSEPH N. GRANO, JR., *et al.*

v.

MARION S. BARRY, MAYOR,
DISTRICT OF COLUMBIA, *et al.*,
Appellants

OLIVER T. CARR, JR., *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 83-0222)

Argued January 3, 1986

Decided February 21, 1986

Richard B. Nettler, Assistant Corporation Counsel, District of Columbia, with whom *John H. Suda*, Principal Deputy Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, District of Columbia were on the brief for appellants.

Richard A. Green, with whom *William Joseph H. Smith* and *William J. Utermohlen* were on the brief for intervenor-appellees.

William A. Dobrovir, with whom *David L. Sobel* was on the brief for appellees.

Before: WALD, MIKVA and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: The District of Columbia ("District") appeals from the District Court's award of attorneys' fees under 42 U.S.C. § 1988 to plaintiffs who successfully sought an injunction prohibiting the demolition of the Rhodes Tavern prior to a scheduled referendum dealing with the future of the tavern. The District urges several grounds for reversal: (a) because the referendum was eventually held unconstitutional by the Superior Court of the District of Columbia, and because the tavern was eventually razed, the plaintiffs were not "prevailing parties" under the statute; (b) since the constitutional claim on which the plaintiffs won the injunction was itself frivolous, no award of fees was justified; (c) even if the claim on which the plaintiffs prevailed was colorable, the District Court should have found that exceptional circumstances in this case precluded an award of fees; (d) the District Court erred in not requiring the intervenors in the suit to share in the payment of fees; and (e) the District Court erred in calculating the fees at $53,579.47. We address each of these claims individually, and in so doing affirm much of the District Court's rationale. We do, however, ultimately remand for consideration of the "special circumstances" issue, and, if fees are awarded, reconsideration of some items involved in their calculation.

I. BACKGROUND

A. *Preliminary Rounds*

After holding public hearings on the issue, the District, on February 11, 1980, ordered the issuance of demolition permits allowing the Oliver T. Carr Company

to raze the Rhodes Tavern in order to construct a large office and retail store complex. Plaintiffs, a group of citizens interested in preserving the historic Rhodes Tavern, failed in their local court challenge to the issuance of the permits. *Citizens Committee to Save Historic Rhodes Tavern* v. *District of Columbia Department of Housing and Community Development*, 432 A.2d 710 (D.C.), *cert. denied*, 454 U.S. 1054 (1981).

Having lost their battle before the District of Columbia courts, the plaintiffs decided to take their issue to the people. In August, 1982, the District of Columbia Board of Elections and Ethics approved the subject matter of an initiative dealing with the preservation of Rhodes Tavern,[1] and in February, 1983, plaintiffs submitted the requisite number of signatures to allow the initiative to appear on the ballot in the November 8, 1983, general election.

Although the District of Columbia Court of Appeals had affirmed the issuance of the demolition permit in May, 1981, Carr could not actually obtain the permit until it met a number of conditions precedent. These included obtaining an exception from the District of Columbia Board of Zoning Adjustment ("BZA"). In May, 1983, the BZA voted to grant Carr's exception, effective as of August 12, 1983.

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[1] The initiative declared it to be the public policy of the District of Columbia "to support, advocate and promote the preservation, restoration and reuse of Rhodes Tavern on its present site . . . ." The initiative specifically mandated the creation of an advisory board to negotiate with Carr for the building's preservation. If the negotiations failed, the board would be required to report to the Mayor on possible means of preserving the tavern. The Board would be further obligated to apply for Category I Landmark status for the building, which would require its preservation. D.C. Code §§ 5-1021-1023 (1985 cum. supp.).

B. *Litigation on the Merits*

1. *Federal Courts*

Realizing that Carr's fulfillment of the conditions precedent to a demolition permit threatened to transform the Rhodes Tavern initiative into a post-demolition eulogy, plaintiffs brought a class action suit in the United States District Court for the District of Columbia on behalf of all registered voters who had signed the petition to have the initiative on the ballot. Plaintiffs sought a temporary restraining order, and a two-stage injunction against the District's issuance of the permit. First, they sought injunctive relief *pending the election*, arguing that if the demolition were to occur sooner, the citizenry would be deprived of its right to an effective vote on a matter that had already been deemed a proper subject of an initiative. Second, they asked the court to extend the injunction so that if the initiative passed, the District would be prohibited from issuing the permit *until the procedures contemplated by the initiative were satisfied.*

The District Court allowed Oliver T. Carr, Jr. and George H. Beuchert, Jr., trustees of the property in question, to intervene in the suit, and after full briefing and oral argument by all parties, granted summary judgment for the plaintiffs. The court enjoined the District

> from issuing a demolition permit . . . (1) until after the November 8, 1983 elections . . . and the certification of the result of the vote on Initiative No. 11; and if the majority of the voters vote YES on Initiative No. 11 and it is enacted as the law of the District of Columbia, then (2) until the procedures contemplated in Initiative No. 11 for the preservation of the Rhodes Tavern are concluded.

Grano v. *Barry*, Civ. Action No. 83-2225 (D.D.C. Sept 1, 1983). In its Memorandum Opinion, the District Court explained its decision as based on the District's citizens'

"right to vote effectively," mem. op. at 7, and the "unquestioned right to petition their government to redress what they believe are grievances," *id.* at 8 (citations omitted). Although the District and intervenors had argued that the initiative was invalid under local law and unconstitutional as a taking of Carr's property, the District Court accepted the plaintiffs' argument that "[n]either the validity nor the constitutionality of the initiative . . . may properly be resolved by this court. Those issues will be ripe for adjudication only if the initiative in fact passes and becomes law." *Id.* at 10.

The District and Carr immediately appealed to this court and twice asked for expedited consideration and summary reversal. The plaintiffs objected, and a motions panel of this court denied the two sets of motions for summary reversal and expedition on October 21, 1983, and on October 28, 1984, respectively.

On November 8, 1983, the voters of the District of Columbia passed Initiative No. 11 by a vote of 22,997 for and 15,420 against. These results were certified and sent to Congress for its statutory review under D.C. Code § 1-233(c)(1) (1981). Since Congress took no action, Initiative No. 11 became law on March 15, 1984. D.C. Law 5-69, *codified as* D.C. Code §§ 5-1021-1023 (1985 cum. supp.).

In its May 4, 1984, decision on appeal, this court first held that the propriety of the District Court's pre-election injunction was now a moot issue since the election had already taken place. *Grano* v. *Barry*, 733 F.2d 164, 167-68 (D.C. Cir. 1984). As for the post-election injunction, we reversed the District Court, finding that the post-election injunction had no basis in federal law. Any possible claims to support such an injunction under local law, we held, must be addressed to the District of Columbia—not the federal—courts. *Id.* at 168-69.

2. *The Local Courts*

With no injunction barring the demolition any longer, plaintiffs filed a new action in the Superior Court of the District of Columbia. On August 20, 1984, that court granted the District's and intervenors' motions for summary judgment, and held that Initiative No. 11, on its face, constituted an unconstitutional taking. *Citizens Committee to Save Historic Rhodes Tavern* v. *Barry*, Civ. Action No. 6833-34 (D.C. Sup. Ct. Aug. 20, 1984). On August 30, the District of Columbia Court of Appeals stayed the Superior Court's order, conditioned upon plaintiffs' posting $100,000 bond by September 6, 1984. Plaintiffs were unable to raise that amount by that date, and the stay was therefore vacated. The court refused to reinstate the stay when, on September 10, plaintiffs proffered the bond, and on that same day the District issued Carr a demolition permit and the tavern was demolished. Grano's appeal of the Superior Court's order was subsequently dismissed as moot.

C. *The Attorneys' Fees Litigation*

During the pendency of the appeal from the District Court's decision in this court, plaintiffs moved the District Court for attorneys' fees against the District and the intervenors. Although the request for attorneys' fees was filed on November 21, 1983—before this court ruled on the appeal and before the Superior Court invalidated the initiative—the District Court did not rule on the motion until February 13, 1985, after the final curtain had been drawn on the Rhodes Tavern. The plaintiffs' amended petitions, accordingly, did not ask for fees associated with the post-election injunction.

The District Court held that plaintiffs were entitled to attorneys' fees for work on the pre-election injunction, but that the fees should be assessed against the District alone—not against the intervenors. *Grano* v. *Barry*, Civ.

Action No. 83-2225, Mem. Op. at 4 (D.D.C. Feb. 13, 1985), *reprinted in* Joint Appendix ("J.A.") at 11-13. As for work associated with the constitutional validity of the initiative, however, the court denied fees, holding that the local court's disposition made it clear that plaintiffs were not prevailing parties on that issue. J.A. at 13-14. Since those noncompensable efforts amounted to 9% of the overall merits fees, the court also reduced 9% from the time plaintiffs had devoted to their efforts to secure attorneys' fees. In addition, the court made a small reduction in compensable costs, reducing the copying costs by 25%. Given these rulings, the court discounted the award of fees and costs from the $59,112.82 that plaintiffs had requested to $53,579.47. J.A. at 14-16. The plaintiffs have not appealed from these adjustments. As previously noted, however, the District does appeal the award on five distinct grounds.

II. Discussion

A. *The "Prevailing Party" Requirement*

Under 42 U.S.C. § 1988, "the District Court must award attorney fees to the prevailing party in civil rights litigation unless special circumstances would render such an award unjust." *See Miller* v. *Staats*, 706 F.2d 336, 340 (D.C. Cir. 1983), and cases cited therein. While it is obvious that a party who succeeds in obtaining a favorable final judgment following a full trial on the merits and exhaustion of all appeals is a prevailing party, it is also clear that a party may be considered to have prevailed even when the legal action stops short of final appellate, or even initial, judgment due to a settlement or intervening mootness. *See Commissioners Court of Medina County, Texas* v. *United States (Medina)*, 683 F.2d 435, 440-41 (D.C. Cir. 1982), and cases cited therein. In such cases, however, it is often more difficult to ascertain whether the party has indeed prevailed or not.

To qualify as a prevailing party for attorneys' fees purposes, a plaintiff must show that the "'final result represents in a real sense, a disposition that furthers their interest.'" *Miller*, 706 F.2d at 341 (D.C. Cir. 1983) (quoting *Medina*, 683 F.2d at 441). In applying this inquiry, the court must "focus on the precise factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or relief from a burden." *Miller*, 706 F.2d at 341 n. 30. Of course, it is not necessary that the plaintiff have prevailed on every claim or achieved all of the benefits he might have hoped for in the litigation. While partial versus complete success is a consideration in assessing the amount of fees, the critical question in evaluating the availability of fees "is whether fee claimants have received any benefit at all." *Id.* (quoting *Medina*, 683 F.2d at 441).

We agree with the District Court that these plaintiffs clearly obtained a significant benefit when they succeeded in ensuring that the voting would take place while the Rhodes Tavern still stood and the initiative still had the *potential* to mean something. Throughout the proceedings, plaintiffs understood that the initiative might eventually be deemed invalid. But they also understood that unless they were successful in obtaining a pre-election injunction, the initiative would become worthless since it would have *absolutely no chance* of meaning anything. As the plaintiffs explained early in the proceeding: they did not "seek to have [the] court 'enact' the initiative. [Their] action s[ought] . . . to preserve the *status quo* for a matter of 11 weeks—until the voters have the opportunity to express their will on the question of the historic preservation of Rhodes Tavern." Plaintiffs' Opposition to Motion of Intervenors for Summary Judgment and Declaratory Relief at 2, *Grano* v. *Barry*, Civ. Action No. 83-2225 (D.D.C. 1983). Plaintiffs faced two hurdles. They successfully surmounted the first by holding off the

demolition until the election. Although their goal of ensuring that the result of the election would have legal effect was subsequently blocked in another court, they nonetheless succeeded in the aspect of their claims that brought them into federal court under section 1983.

This case is consequently different from the line of cases holding that no fees are available for mere procedural victories. *See, e.g., Hanrahan* v. *Hampton*, 446 U.S. 754 (1980). In *Hanrahan*, the Supreme Court held that appellate reversal of a directed verdict, did not, in and of itself, constitute substantial success. The Court explained that "Congress intended to permit the interim award of counsel fees only when a party has *prevailed on the merits* of at least some of his claims." *Id.* at 758 (emphasis added). In the case before us, the plaintiffs' success before the District Court was clearly "on the merits". The parties cross-motioned for summary judgment and the District Court's ruling in favor of the plaintiffs was based on its recognition of a constitutional right to vote in a pending initiative.[2] The mootness of the subsequent appeal of that holding following the actual election and the passage of the initiative, emphasizes, rather than detracts from, the practical substance of their victory.

Indeed, in holding that the pre-election issue was moot, this court explained that: "[O]f course, our dismissal of this part of the appeal as moot is not dispositive as to the issue of attorneys' fees. . . . *See Williams* v. *Alioto*, 625 F.2d 845 (9th Cir. 1980)." *Grano* v. *Barry*, 733 F.2d 164, 168 n.2 (D.C. Cir. 1984). *See generally Doe* v. *Marshall*, 622 F.2d 118, 120 (5th Cir. 1980) ("determination of mootness does not prevent an award of attor-

[2] That the constitutional issue was decided on the merits also distinguishes this case from the decision in Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). There, the plaintiffs had obtained only a *temporary restraining order* which, the court stressed, was "in no way a determination on the merits." *Id.* at 137.

neys' fees on remand"), *cert. denied*, 451 U.S. 993 (1981); Comment, *Civil Rights Attorneys' Fees Award in Moot Cases*, 49 U. Chi. L. Rev. 819, 831-38 (1982) (discussing criteria used in awards in moot cases).

In "procedural victory" cases such as *Hanrahan*, the party is held not to have prevailed because his litigation goals are clearly not satisfied by the procedural victory. For example, when an appellate court rules that a trial on an issue must be held, the plaintiffs have not prevailed; "[a]s a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court." *Hanrahan*, 446 U.S. at 758-59. In such cases the procedural victory relates only to the litigation process, and the plaintiffs have not prevailed on what they *originally* came into court for. Here, by contrast, the victory represented a substantial part of what plaintiffs asked the court for in the first place. The District Court's ruling had the distinct external effect of postponing the razing of the tavern until the election could be held. Such a victory is in no way "procedural." *See Massachusetts Fair Share* v. *Law Enforcement Assistance Administration*, 776 F.2d 1066, 1068-69 (D.C. Cir. 1985) (plaintiffs who obtained court order that two agencies—instead of one—had to make decision on grant were prevailing parties: "this is precisely the point that [plaintiffs] litigated, and won"); *Bagby* v. *Beal*, 606 F.2d 411, 415 (3d Cir. 1979) (fired plaintiff who succeeded in obtaining court order recognizing her due process right to administrative hearing was a prevailing party even though the hearing eventually affirmed the firing).

B. *Nonfrivolousness of Claims*

When a party's success in achieving his goal results from a settlement, or some other events occurring before there has been a judicial ruling on the merits of the civil

rights claims, it is necessary under the attorneys' fees provision of section 1988 to determine whether there were colorable civil rights claims involved in the case and whether they served as catalysts in securing the result. In carrying out this inquiry, courts assess the legal claims advanced by the plaintiff to ensure that they are not "frivolous, unreasonable, or groundless." *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978); *see also Miller*, 706 F.2d at 341 n.31 (adopting *Nadeau* test). If so, fees are unavailable for two reasons. First, if the claims are frivolous it is assumed that the defendants "acted gratuitously," and that the claims could not have been catalysts to the settlement or relief. *Nadeau*, 581 F.2d at 281. Second, it has been suggested that "unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have 'enforced' the civil rights laws or to have promoted their policies for the benefit of the public at large." *Long* v. *Bonnes*, 455 U.S. 961, 967 (Rehnquist & O'Connor, JJ., dissenting from the denial of certiorari). The District argues that since there was never a final appellate ruling on the merits of the pre-election injunction, the "frivolous" test should be applied, and that the constitutional claims advanced in this case do not pass muster.

This argument is based on a misconception about the function of the frivolous test. The inquiry is not to be applied whenever some factor makes appellate review unavailable. The test applies only when there has never been any *judicial* determination whatsoever on the merits. In the context of a case settled or mooted prior to any judicial determination, the two questions of causation and colorability need to be answered, and the frivolousness test answers them. But when the party has prevailed as a direct result of a district court order accepting his civil rights claims on their merits, the issues of causation and colorability are clear, and the frivolousness test

serves no purpose. *Cf. Williams* v. *Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) (awarding fees in mooted case without inquiring into merits of claims since "appellees did obtain a judicial determination that appellants had acted unconstitutionally"), *cert. denied*, 450 U.S. 1012 (1981); *Bagby* v. *Beal*, 606 F.2d 411, 414-15 (3d Cir. 1979) (not inquiring into merits of claim where district court had already ruled in favor of fee claimant in now mooted case).

As for the causation element, if the relief gained from the suit is the direct result of a district court's ruling, there can be no doubt about what caused the relief; a defendant acting in accordance with a court order cannot be presumed to be acting gratuitously.

Similarly, the colorability inquiry, which asks whether the party in fact prevailed because of "civil rights" claims, makes little sense when a district court has formulated its order on the basis of those very civil rights claims. The test was developed for use when, because of some intervening factor, there has been no judicial determination that the claims are at all related to the civil rights laws. In such a case, the court does not simply accept the fact that the plaintiff labelled the claims as civil rights claims in his complaint, but rather looks at the claims to ensure that they are colorable civil rights claims. Even in that circumstance, the test is an extremely lenient one. *See Miller*, 706 F.2d at 341 n.31 (standard to be applied "duplicates the threshold test for federal matter jurisdiction" as laid out in *Hagans* v. *Lavine*, 415 U.S. 528, 536-43 (1974)). But once a court has already ruled that the claims are actionable—not just colorable—civil rights claims, the question of whether the party meets the statutory requirement of having prevailed on the basis of "civil rights" claims has been unequivocally answered.

C. *Exceptional Circumstances*

Once a claimant is found eligible for attorneys' fees, the only remaining question is whether special circumstances exist that would render such an award unjust. *See Medina*, 683 F.2d at 438; S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1974), *reprinted in* U.S. Code Cong. & Admin. News 1975, p. 774. In *Medina*, this court explained that:

> in the exercise of its discretionary function to determine whether an award of fees is just under the circumstances of this case, the court should consider whether the net result is [such] . . . that it would be stretching the imagination to consider the result a "victory" in the sense of vindicating the rights of the fee claimants. If the victory can fairly be said to be only a psyrrhic one, then an award of fees would presumably be inappropriate.

Medina, 683 F.2d at 442-43.

In this case, the District strenuously argued before the District Court that the facts came within the "pyrrhic victory" rubric, and asked the court to use its discretion to deny fees on that basis. *See, e.g.*, Defendants' Opposition to Plaintiffs' Motion for Attorneys' Fees at 2-11. *Grano* v. *Barry*, Civ. Action No. 83-2225 (D.D.C. 1984) (arguing that special circumstances relating to "nature of the controversy" and "limited nature of the relief granted" justified denial of fees); Intervenors' Opposition to Plaintiffs' Motion for Attorneys' Fees at 10-18, *Grano* v. *Barry*, Civ. Action No. 83-2225 (D.D.C. 1984) (arguing that nature of the "state action," and nature of the relief justified denial of fees).

Apart from the unusual circumstance that the vote on the Rhodes Tavern initiative was ultimately declared unconstitutional, the District has also stressed its uniquely frustrating position in the litigation: it had no choice under District law but to issue the demolition permit

once the conditions precedent were fulfilled. No matter which course it followed—granting or withholding the permit—either the plaintiffs or Carr would have claimed it was acting unconstitutionally. In such a squeeze play, it argued, it would not be equitable to assess attorneys' fees against it. Finally, the District and intervenors argued that the Superior Court's holding that the initiative violated a *third party's* constitutional rights, certainly constituted special circumstances.

Although the District focused much of its argument on the exceptional circumstances doctrine,[3] the District Court never specifically responded to that issue, and certainly never provided any reasoned explanation for its implicit rejection of the argument. In *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc), this court explained that meaningful review of district court awards of attorneys' fees requires a statement of reasons which we can evaluate, and indicated that in some cases it is necessary to remand to the district court for adequate articulation of its reasoning. *Id.* at 901 n.39. Indeed, the Supreme Court has instructed in the context of adjustments to fees, that when adjustments are "requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the *district court should make clear* that it has considered the relationship between the amount of the fee awarded and the results obtained." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) (emphasis added). We find that this requirement is no less applicable where the contested issue is the presence of special circumstances. *Cf. Medina*, 683 F.2d at 444 (instructing district court to provide "statement of reasons" if it finds that exceptional circumstances would make an award of fees unjust). We therefore

[3] For a discussion of some of the factors that we have included in this inquiry to date, see *Miller*, 706 F.2d at 342-43; *Medina*, 683 F.2d at 442-44.

remand to the District Court, which has "superior understanding of [this] litigation," *id.*, to pass on this issue.

Our holding today does not mean that district courts have an affirmative duty in each and every case to set forth reasoning on the special circumstances issue. But in a case where a major part of the defendant's argument focuses on that issue, a district court should set forth its reasoning for concluding that special circumstances do not exist.

D. *Exclusion of Intervenor*

The District Court recognized that it had the right to assess fees against the intervenors as well as the District, but deemed it inappropriate to do so. The court explained that "[i]n one sense, the intervenors' posture in this action was similar to that of plaintiffs, in that both intervenors and plaintiffs were involved in this litigation to protect their rights under the Constitution." J.A. at 4. We cannot say that the District Court abused its discretion in excluding Carr under these circumstances. *See Kirkland* v. *New York State Department of Correctional Services*, 524 F. Supp. 1214 (S.D.N.Y. 1981) (recognizing special status of parties who intervene to protect their own constitutional rights); *cf. Sierra Club* v. *Environmental Protection Agency*, 769 F.2d 796, 810 (D.C. Cir. 1985) (discussing general reluctance to assess fees against intervenors under different statute).

E. *Calculation of Fees*

Finally, the District argues that even if fees should have been awarded, the District Court erred in its calculation of the appropriate fees. The Supreme Court has instructed that in assessing fees a district court should take cognizance of the reasonableness of fees as related to the degree of success obtained, and should, if feasible, exclude fees associated with claims upon which the party

did not succeed, and which are not integrally related to the claims that the party prevailed upon. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 434-37 (1983). In laying out the test, the Court emphasized that "there is no precise rule or formula in making these determinations" and that the district court "necessarily has discretion" in this area. *Id.* at 436-37. With this framework in mind we proceed to the individual objections raised by the District.

1. *The Issues That Plaintiffs Prevailed Upon*

The District Court apparently accepted the District's and intervenors' argument that plaintiffs should not be compensated for time spent arguing the validity of the initiative under local and constitutional law. While plaintiffs had urged that the validity-related issues would not become ripe until after the election, the District Court explained that:

> Even if plaintiffs can be deemed to have prevailed on the basis of this narrow holding, the ultimate decision of the District of Columbia courts that the initiative was invalid as a violation of the constitutional rights of the intervenors precludes a finding that plaintiffs were the "prevailing party" on this issue in any meaningful sense.

J.A. at 14.

When it came to actually deducting the fees for that issue, however, the District Court only excluded "fees for time spent litigating the *constitutional* validity of Initiative 11." *Id.* at 15 (emphasis added). The court never explained why it was only deducting the time spent on the constitutional validity but not deducting what seems to have been considerable time spent on the local validity issue. There may be some plausible explanations for this distinction between the constitutional and local law issues. But instead of our hypothesizing about what they

may have been and passing judgment on rationales that might not have motivated the district court at all, we feel the better course is to remand to the district court on this issue.[4]

2. *Work on Appellate Proceedings*

The District argues that plaintiffs are not entitled to work done in opposing the District's motion for summary reversal and expedited consideration. The District cites to *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), for the proposition that procedural victories are not compensable. This reading of *Hanrahan* is too broad. *Hanrahan* simply held that when *all* that the party has won is a "procedural" victory he has not prevailed and is therefore not entitled to fees; it never questioned the proposition that a prevailing party is entitled to compensation for his attorneys' fees in the litigation as a whole. *See* discussion *supra* pp. 9-10. Indeed, in this case, opposition to summary reversal and deferral of the appellate proceedings were an integral part of the plaintiffs' success in preserving the pre-election injunction.

We are similarly unpersuaded by the District's contention that none of the work on the merits of the appeal should have been compensated. It was the District—not the plaintiffs that persisted in bringing the legal challenge to the pre-election injunction even after the election took place. It was the plaintiffs' position, and later the position of the court, that the issue was moot. Plaintiffs' efforts in defending the District Court judgment on which they prevailed were clearly "reasonable in relation to the success achieved," *Hensley*, 461 U.S. at 436, and

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[4] Fully cognizant of the general reluctance to remand attorneys' fees litigation and thus potentially add to the fees incurred, *see Copeland*, 641 F.2d at 901 & n.42, we nonetheless conclude that this issue is so central to the correct disposition of the fee petition, that remand is the only prudent course.

it was thus within the District Court's discretion to award those fees.

In calculating the fees for appellate work, the District Court again deducted all work related to the initiative's constitutional validity. But the court did not deduct the fees related to the validity of the initiative under local law. Consistent with our holding today, *see supra* pp. 16-17, we remand to the District Court to decide whether the local law issue should be excluded as well.

3. *Work on Amendments to Memoranda on Attorneys' Fees*

Finally, the District challenges the award of fees for time associated with the amended memoranda on attorneys' fees. These memoranda were filed to take account of the rapidly changing factual circumstances as well as legal developments, most significantly this court's decision in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984) (establishing new method of calculating rates for firms such as the one involved here), *cert. denied*, 105 S. Ct. 3488 (1985). It is of course a long-standing rule that hours reasonably devoted to litigating attorneys' fees are compensable. *See Action on Smoking and Health* v. *CAB*, 724 F.2d 211, 224 (D.C. Cir. 1984); *Copeland* v. *Marshall*, 641 F.2d 880, 896 & n.29, 901 (D.C. Cir. 1980) (en banc). The District has made no showing that the time spent on attorneys' fees here was unreasonable, could have been avoided, or was unrelated to the fees award.

CONCLUSION

We have carefully reviewed the record and the parties' arguments and have concluded that the District Court was correct in holding that the plaintiffs were prevailing parties on the pre-election injunction. Nonetheless, since the court did not address the District's arguments regarding the special circumstances rule, we find it neces-

sary to remand the case to the District Court. Upon remand, and if it reaffirms its award of attorneys' fees, the District Court should also consider whether the reasoning that led it to exclude time spent on the constitutionality of the initiative issue, also requires it to deduct time spent on the validity of the initiative under local law. Thus, the order of the district court granting attorneys' fees is

Remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1975

JOSEPH N. GRANO, JR., *et al.*

v.

MARION S. BARRY, JR., MAYOR,
DISTRICT OF COLUMBIA, *et al.*,
Appellants

OLIVER T. CARR, JR., *et al.*

83-1976

JOSEPH N. GRANO, JR., *et al.*

v.

MARION S. BARRY, JR., MAYOR,
DISTRICT OF COLUMBIA, *et al.*

OLIVER T. CARR, JR., *et al.*,
Appellants

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 83-02225)

Argued February 7, 1984

Decided May 4, 1984

Richard B. Nettler, Assistant Corporation Counsel, with whom *Judith W. Rogers*, *Corporation Counsel* (at the time the brief was filed), and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief for Barry, et al., appellants in No. 83-1975.

Richard A. Green with whom *Norman M. Glasgow*, *Whayne S. Quin*, *Louis P. Robbins*, *C. Francis Murphy*, and *George H. Beuchert, Jr.* were on the brief for appellants in No. 83-1976. *William Joseph H. Smith* also entered an appearance for appellants, Carr, et al.

William A. Dobrovir and *David L. Sobel* were on the brief for appellees in Nos. 83-1975 and 83-1976.

Before WALD, BORK and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BORK

BORK, *Circuit Judge*: Mayor Marion S. Barry, Jr., other District of Columbia officials, and Oliver T. Carr, Jr. and George H. Beuchert, Jr., trustees, appeal from a district court order enjoining the District of Columbia from issuing a permit for the demolition of Rhodes Tavern and a permit for the construction of a new building. The injunction preserved the status quo pending the outcome of a referendum on an initiative to preserve the Tavern and, in the event the initiative passed, until the procedures contemplated in the initiative should be concluded. While this appeal was pending, the initiative passed. Consequently, as to the issues raised by the issuance of an injunction pending a referendum, we hold that the case is now moot. Regarding the issues raised by continuation of the injunction after the initiative passed, we hold that there is no basis in federal law for the order and, further, that it would be an abuse of discretion for the federal court to retain jurisdiction over any local law issues. We therefore remand to the district court with directions to dissolve the injunction and dismiss the case.

I.

Rhodes Tavern, in downtown Washington, D.C., was constructed between 1799 and 1801. Though the building

has been extensively altered over time and most of it was razed in 1957, it is regarded as an historical landmark. In 1977, the Oliver T. Carr Co., a real estate developer, and the real party in interest here, proposed to build an office and retail complex on a site including the land now occupied by Rhodes Tavern. There followed complex and lengthy discussions and negotiations involving the Carr Co., the District, and local preservation groups. These and other aspects of the procedures required of the developer are set out in the opinion of the District of Columbia Court of Appeals in *Citizens Committee to Save Historic Rhodes Tavern* v. *District of Columbia Department of Housing & Community Development*, 432 A.2d 710, *cert. denied*, 454 U.S. 1054 (1981). It will suffice to say here that the Carr Co. filed applications for permits to relocate or demolish Rhodes Tavern and for construction on the site. Since the Tavern is classified as a Category II landmark structure under the District of Columbia Historic Landmark and Historic District Protection Act of 1978, the Carr Co.'s applications were referred to the Joint Committee on Landmarks. That Committee recommended that the Mayor's Agent hold a public hearing. After hearings on three days, during which she heard 28 witnesses and received 84 exhibits in evidence, the Mayor's Agent on February 11, 1980, found that the permits were necessary to allow the construction of a project of special merit (the finding required to permit demolition or relocation) and ordered the issuance of the permits.

The Citizens Committee to Save Historic Rhodes Tavern petitioned the D.C. Court of Appeals for review. Stating that a balancing of historical and developmental values was required, the court held that the Mayor's Agent had performed that task and affirmed her decision. *Citizens Committee*, 432 A.2d 710.

The demolition permit could not be issued immediately because D.C. Code Ann. § 5-1004(h) (1981) requires that

the demolition and construction permit issue at the same time. The final drawings required for the construction permit had not been submitted. The developer also was seeking a special exception to the zoning requirements. The special exception has been granted and the permits for demolition and construction have been ready for issuance for some time. While the Carr Co. was attempting to obtain the permits and the special exception, however, appellee Grano and other members of the Citizens Committee to Save Historic Rhodes Tavern drafted an initiative (Initiative No. 11) to secure the building's preservation.[1] The District of Columbia Board of Elections and Ethics certified that Initiative No. 11 had met the requirements for inclusion on the ballot for the November 3, 1983 election. The day after the District's Board of Zoning Adjustment issued a written opinion granting Carr a special exception, the last prerequisite for issuance of construction and demolition permits, appellees brought suit in the district court against officials of the District seeking a temporary restraining order and a preliminary and permanent injunction prohibiting issuance of the demolition and construction permits. Trustees Carr and Beuchert intervened as parties defendant.

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[1] The initiative declared it to be the public policy of the District of Columbia "to support, advocate and promote the preservation, restoration and reuse of Rhodes Tavern on its present site . . . ." More specifically, the initiative mandated creation of an advisory board to "negotiate with the owners of Rhodes Tavern to determine whether said owners will enter into an agreement to fulfill the objectives declared in" the initiative. Should those negotiations fail, the initiative required the advisory board to report to the Mayor on other ways of achieving these goals. Moreover, the advisory board was obligated to apply Category I Landmark status for Rhodes Tavern, which, under some interpretations, would require the Tavern's preservation. Initiative Measure No. 11 By the People of the District of Columbia (Joint Appendix, Part C); *compare* Brief for District of Columbia Appellants at 6-10 and Brief for Appellees at 7. Indeed, the substantive effect of the initiative appears to be a matter of dispute.

The district court granted plaintiffs' motion for summary judgment, holding that plaintiffs' right to vote would be violated were the permits for demolition and construction issued prior to the election. To forestall such an occurrence, the district court granted a permanent injunction against the District's issuance of those permits

> (1) Until after the November 8, 1983, election in the District of Columbia and the certification of the result of the vote on Initiative No. 11 . . . .

The court further held that the issues raised by defendants—the constitutionality and statutory validity of the proposed initiative—were not ripe for adjudication. Nevertheless, the court ordered that if the initiative were passed by majority vote and enacted into law, then the injunction should remain in effect

> [u]ntil the procedures contemplated in Initiative No. 11 for the preservation of Rhodes Tavern are concluded.

While the injunction was in effect, the referendum was held, and the initiative received a majority of YES votes. On January 24, 1984, the Chairman of the District of Columbia Council transmitted the initiative to the Speaker of the House of Representatives and the President of the Senate for a thirty-day period of Congressional review. That period has elapsed and the initiative is now law.

II.

We consider first the threshold question whether the issues presented by the granting of an injunction pending a referendum are now moot. We hold that they are. The referendum having been held, these issues have "lost . . . [their] character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). This case does not fall within the "capable of repetition, yet evading review" exception.

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498, 515 (1911). In *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975), the Supreme Court held that this exception applies only where a case satisfies two criteria:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

The case before us clearly fails to meet the second part of the test, the "capable of repetition" requirement. Under *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953), a case is moot if "there is no reasonable expectation that the wrong will be repeated." *Id.* at 633. In this case, there are too many variables to allow a prediction that appellants will again be subjected to action of this sort. One would have to suppose that the Carr Co. would again attempt to demolish a District of Columbia building with alleged historical significance, that the Joint Committee on Landmarks would approve, that an initiative to save the building would once more be put to a referendum, and that a trial court would issue an injunction preventing demolition pending the outcome of the referendum. Appellants have adduced no evidence creating a reasonable expectation that any of these things will reoccur, much less than all of them will. The cases appellants rely upon involve continuing statutory schemes that would predictably have the same effect upon plaintiffs in the future. *See, e.g., Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969).

A closer parallel to the present case is *Brockington* v. *Rhodes*, 396 U.S. 41 (1969), where the Supreme Court found the case moot, in part because the requested relief had been tied to a particular election that was over. Because it does not fall within the "capable of repetition, yet evading review" exception, we hold that appellants'

challenge to that part of the injunction in effect prior to the election is now moot.[2] It follows, of course, that this part of the judgment below must be vacated. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

III.

There remains the question of the injunction forbidding issuance of the demolition and construction permits until the procedures contemplated in the initiative are completed. We are at something of a disadvantage in reviewing this aspect of the judgment because the district court's opinion discusses only the supposed constitutional right to vote in an upcoming referendum as a reason to enjoin the issuance of the permits prior to the referendum. There is no discussion of the legal basis for enjoining the issuance of the permits after the referendum until the procedures contemplated by the initiative are completed.

So far as we can tell, however, this latter injunction was issued in response to a claim made under federal law. The broad language of the complaint permits the inference that plaintiffs alleged that their federal constitutional right to vote included the right to have their vote rendered meaningful by federal court enforcement of the District's statute. Moreover, the only legal argument made in plaintiffs' motion for summary judgment and the only discussion of law in the district court's opinion was of federal constitutional law. We conclude that the post-referendum aspect of the order rested upon a federal claim. That being so, we reverse the judgment.

The cases on which appellees rely involve challenges to procedural aspects of state electoral systems such as unduly restrictive fees and percentage-of-the-electorate re-

[2] Of course, our dismissal of this part of the appeal as moot is not dispositive as to the issue of attorneys' fees raised at oral argument. *See* Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980).

quirements for individuals and parties seeking ballot positions. *See, e.g., Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1978); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Bullock* v. *Carney*, 405 U.S. 134 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Georges* v. *Carney*, 546 F. Supp. 469 (N.D. Ill. 1982); *Citizens Against Legalized Gambling* v. *District of Columbia Board of Elections & Ethics*, 501 F. Supp. 786 (D.D.C.), *aff'd per curiam*, No. 80-2251 (D.C. Cir. Oct. 20, 1980). These cases have little to do with the question before us. It is one thing for the federal Constitution to guarantee a right of access to a state electoral process that has been restricted by state law. It is quite another to assert that the federal Constitution guarantees that state officials will act in conformity with state law. In the former case, no relief is available under state law; in the latter, complete relief is available. In the former, an official policy of a state is challenged—in the latter no official policy of the state is challenged; rather, the state's policy is sought to be vindicated. Vindication of state policy ought, as an initial matter, to take place in state courts. Perhaps for these or similar reasons, no case cited to us or of which we are aware has ever held that the constitutional right to vote in state elections extends so far as to include a right to control the behavior of state officials under state law. To the contrary, the Supreme Court has held that an elected official's threatened violation of a state law does not automatically raise a federal claim. *See Snowden* v. *Hughes*, 321 U.S. 1 (1943); *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913); *Barney* v. *City of New York*, 193 U.S. 430 (1904). If official violations of such laws automatically created federal causes of action, a great many cases involving only local issues that were fully remediable under state law would be brought in federal courts.

We have held that one part of the injunction is moot and that the other cannot be justified in terms of federal

law and must be dissolved. The only question remaining is whether any further proceedings may be held in the district court. We think not.

The only theory that might sustain continuing federal jurisdiction is that appellees might be able to adduce a basis for an injunction under District of Columbia law and that the district court could entertain such a request as a matter of pendant jurisdiction. Ordinarily, the question of whether the federal courts should retain jurisdiction over pendant issues after the federal issues have disappeared from the case lies within the discretion of the district court. *See Rosado* v. *Wyman*, 397 U.S. 397 (1970). That discretion is not, however, unbounded, and we think it would be an abuse of discretion for the district court to retain jurisdiction in this case. Since no right to an injunction under District of Columbia law was pleaded or argued, entertaining such a claim now would be somewhat like initially taking jurisdiction over a local law issue when there is no federal claim to which it could be pendant. But even if this were not so and a local claim could be regarded as pendant, no such claim should be entertained by the district court.

In general, "principles of comity and the desirability of a 'surer-footed reading of applicable law' support the determination of state claims in state court." *Financial General Bankshares, Inc.* v. *Metzer*, 680 F.2d 768, 769 (D.C. Cir. 1982) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966)).[3] Determination by the state court is especially important where the case involves

[3] Although the District of Columbia is constitutionally distinct from the states, it may nevertheless be treated as a state for present purposes. *Cf.* Wachovia Bank & Trust Co. v. National Student Marketing Corp., 461 F. Supp. 999, 1010 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (following *Gibbs*); National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 88 (D.D.C. 1977), *aff'd mem.*, 595 F.2d 888 (D.C. Cir. 1979) (same); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1329 (D.D.C. 1977) (same).

"novel and unsettled" issues of state law. 680 F.2d at 775. *Cf. id.* at 769 (district court found to have abused its discretion in exercising pendent jurisdiction over local claims where all federal claims had been resolved before trial and court decided novel and difficult issues of local law). Here, the law in question is new, its meaning ambiguous and sharply disputed. *See* note 1, *supra*. Moreover, the district court should not retain jurisdiction because this case directly implicates the processes by which a locality governs itself. Appellees' remedy, if any, lies in the courts of the District of Columbia.

For these reasons we remand with orders to vacate the judgment underlying the injunction that has become moot, dissolve the remaining injunction, and dismiss the complaint.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-7043

JOSEPH N. GRANO, JR., *et al.*

v.

MARION S. BARRY, JR., MAYOR,
DISTRICT OF COLUMBIA, *et al.*,
Appellants

OLIVER T. CARR, *et al.*

[Filed Nov. 6, 1987]

Appeal from the United States District Court
for the District of Columbia

Before: WALD, *Chief Judge*, MIKVA and FRIEDMAN*, *Circuit Judges.*

JUDGMENT

This case was reviewed on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel for appellants and appellees. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* D.C. Cir. Rule 14(c) (August 1, 1987). On consideration thereof, it is

ORDERED and ADJUDGED, by this court, that the judgment of the district court appealed from in this

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

cause is hereby affirmed for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED, by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15(b)(2) (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

I. Background

The District of Columbia appeals for the second time the district court's award of attorneys' fees in this protracted litigation aimed at preserving the Rhodes Tavern in Washington, D.C. While the plaintiffs succeeded in delaying the Tavern's destruction until after an initiative for its preservation had been passed, the District and the Tavern's owner successfully challenged the initiative's constitutionality in another case, *Citizens Committee to Save Historic Rhodes Tavern* v. *Barry*, Civ. Action No. 6833-34 (D.C. Sup. Ct. Aug. 20, 1984), and the Tavern was ultimately demolished. The full history of this litigation is summarized in this court's first attorneys' fees decision, *Grano* v. *Barry*, 783 F.2d 1104, 1106-08 (D.C. Cir. 1986).

In that case, after affirming the district court's finding that the plaintiffs were prevailing parties who had raised nonfrivolous civil rights claims, we remanded for a reasoned explanation of the district court's implicit rejection of the government's argument that "special circumstances" made the award of fees to the plaintiffs unjust. *Grano*, 783 F.2d at 1112. We also remanded so that the district court could determine whether the reasoning that led it to deduct the amount of time spent defending the initiative's constitutional validity should also require it to deduct time spent on the initiative's validity under local law. *Id.* at 1112-14. The district court found that no special circumstances existed and that time spent defending the initiative's validity under local law was properly included in the fee calculation. *Grano* v. *Barry*, Civ. Action No. 83-2225, mem. op. (D.D.C. Aug. 27, 1986). Because the district court on remand provided a reasoned explanation for these decisions, we find no abuse of discretion and affirm its award of attorneys' fees. *See Morgan* v. *District of Columbia*, 824 F.2d 1049, 1065 (D.C. Cir. 1987) ("[a] trial court's award of attorney's fees may be upset on appeal only if it represents an abuse of discretion").

II. Special Circumstances

In remanding on the issue of alleged special circumstances, we raised three concerns, each of which the district court has now satisfactorily addressed. *Grano*, 783 F.2d at 1111. *See also Grano*, No. 83-2225, mem. op. (D.D.C. Aug. 27, 1986). The District of Columbia failed to make the strong showing of special circumstances that is necessary to support the denial of attorneys' fees. *See Wilson* v. *Stocker*, 819 F.2d 943, 951 (10th Cir. 1987).

First, we asked the court to address the District's argument that the plaintiffs had won only a "pyrrhic victory." *Grano*, 783 F.2d at 1111 (citing *Commissioners Court of Medina County, Texas* v. *United States*, 683 F.2d 435, 442-43 (D.C. Cir. 1982)). The district court found that the plaintiffs' victory was not pyrrhic because they successfully secured for the electorate a meaningful right to vote; Rhodes Tavern was not demolished before the referendum. *Grano*, No. 83-2225, mem. op. at 5 (D.D.C. Aug. 27, 1986).

We were also concerned that the District of Columbia might have been caught in a "squeeze play" in which it had no way to avoid a charge that it was acting unconstitutionally. *Grano*, 783 F.2d at 1111. On remand, the district court explained that the District was not a passive observer faced with a no-win option. *Cf. Trahan* v. *Regan*, 824 F.2d 96, 103-05 (D.C. Cir. 1987). The District was not compelled to oppose plaintiffs' attempt at obtaining an injunction. For example, it could have requested a declaratory judgment regarding the constitutional rights of the plaintiffs and the Tavern's owner. *Grano*, No. 83-2225, mem. op. at 6 (D.D.C. Aug. 27, 1986).

Finally, we asked the district court to consider the argument that the ultimate decision of the Superior Court of the District of Columbia that the initiative itself violated a third party's constitutional rights demonstrates special circumstances, making the award of fees against the District unjust. *Grano*, 783 F.2d at 1111. The district court explicitly rejected the District's argument because the superior court's decision only addressed the Tavern owner's property rights and did not balance the two sets of constitutional rights as the district court had to do in granting the pre-referendum injunction. *Grano*, No. 83-2225, mem. op. at 7 (D.D.C. Aug. 27, 1986).

The District of Columbia asks us to reopen the merits of the district court's initial decision to grant this injunction, *Grano* v. *Barry*, Civ. Action No. 83-2225, mem. op. (D.D.C. Sept. 1, 1983), in order to address the argument that the plaintiffs have done more to impair than advance civil rights. We decline this invitation; the pre-referendum injunction issue is moot, *Grano* v. *Barry*, 733 F.2d 164, 167-68 (D.C. Cir. 1984), the plaintiffs are prevailing parties, and the civil rights claims upon which they prevailed are not frivolous. *Grano*, 783 F.2d at 1108-11. Revisiting the constitutional claims initially raised in this litigation for the purpose of searching for special circumstances would run afoul of the Supreme Court's admonishment that "[a] request for attorney's fees should not result in a second major litigation," *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

The District's remaining arguments do not convince us the district court abused its discretion in finding no exceptional circumstances. The district court rebutted the claim that the District had no choice but to oppose the injunction by pointing out the availability of a declaratory judgment. The asserted good faith of the District is insufficient to establish special circumstances. *Miller* v. *Staats*, 706 F.2d 336, 343 (D.C. Cir. 1983).

The mere presence of competing constitutional claims is not enough either; to deny attorneys' fees in all cases involving competing constitutional claims would discourage litigation of the most difficult civil rights issues, those perhaps most in need of adjudication. Finally, we reject the District's suggestion that our misplacement of its motion for expedited disposition constitutes a special circumstance. *See Trahan*, 824 F.2d at 105. We addressed the motion before the referendum and denied it, and nothing suggests that an earlier examination would have altered our determination.

III. Fee Calculation

The district court, on remand, concluded that the reasoning that led it to exclude time spent defending the constitutionality of the initiative did not require it to deduct time spent on the validity of the initiative under local law. *Grano*, No. 83-2225, mem. op. at 7-8 (D.D.C. Aug. 27, 1986). The court's reasoning adequately explains the distinction and we find no abuse of discretion.

As the district court explained, the plaintiffs successfully countered the District's argument that the initiative was invalid under local law. *Id.* No court has ever found the initiative invalid under local law. The District does not dispute these facts, but simply asserts that:

> [The] issue was presented only because plaintiffs insisted that they could enforce the initiative after it passed. Since they lost on their right to enforce the initiative, they should get no fees for their arguments premised on winning that argument.

Appellants' Brief at 1 n.1. The District's motivation, however, does not change the fact that the plaintiffs were forced to defend the initiative under local law and prevailed. Therefore, we find no abuse of discretion in the district court's decision not to deduct time spent arguing this issue in calculating its fee award.

For these reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5264

JOSEPH N. GRANO, JR., *et al.*

v.

MARION S. BARRY, MAYOR,
DISTRICT OF COLUMBIA, *et al.*,
Appellants

OLIVER T. CARR, JR., *et al.*

[Filed Feb. 21, 1986]

Appeal from the United States District Court
for the District of Columbia

Before: WALD, MIKVA and SILBERMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that this case is hereby remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 21, 1986

Opinion for the Court filed by Circuit Judge Wald.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2225

JOSEPH N. GRANO, JR., *et al.*,
Plaintiffs,

v.

MARION S. BARRY, JR., *et al.*,
Defendants.

[Filed Aug. 27, 1986]

MEMORANDUM

This matter comes before the court on remand from the D.C. Circuit Court of Appeals. After consideration of the supplemental papers filed by the parties regarding that court's ruling, as well as the extensive record generated in this matter, this court reconsiders its earlier award of attorneys' fees and reaffirms its judgment.

I. *Background*

On September 1, 1983, plaintiffs were granted an injunction by this court prohibiting the demolition of the historic Rhodes Tavern prior to a scheduled referendum dealing with the future of the tavern. When the referendum was held, voters favored preserving the tavern, but the D.C. Circuit Court of Appeals vacated this court's post-referendum injunction as not supported by federal law, *Grano v. Barry*, 733 F.2d 164, 168-69 (D.C. Cir. 1984) and the D.C. local courts struck down the result of the refendum as an unconstitutional taking. *Citizens Comm. to Save Historic Rhodes Tavern v. Barry*, No. 6833-84 (D.C. Super.Ct. Aug. 20, 1984). The Rhodes Tavern was then demolished.

On February 13, 1985, this court granted to plaintiffs an award of attorneys' fees pursuant to 42 U.S.C. § 1988 in the amount of $53,579.47. The District of Columbia appealed that ruling to the D.C. Circuit Court of Appeals. The court of appeals affirmed much of this court's rationale, but remanded the case for consideration of the "special circumstances" issue and reconsideration of the calculation of the fees. *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986). This court gave the parties an opportunity to file supplemental briefs on these issues.

II. *The Earlier Attorneys' Fees Award*

Under 42 U.S.C. § 1988, a district court may award attorneys' fees to the prevailing party in civil rights litigation. In the ruling of February 13, 1985, this court declined to assess fees against the intervenor, Oliver Carr. The court did assess fees, however, against defendant District of Columbia in the amount of $53,579.47. The court reasoned that plaintiffs' successful efforts in obtaining an injunction so that a meaningful referendum could be held entitled plaintiffs to attorneys' fees for hours expended obtaining the injunction. Further, the court awarded fees for hours expended opposing the District of Columbia's motion for expedited consideration of the appeal from the injunction ruling. Plaintiffs were determined to be the "prevailing party" on these two matters. No fees were awarded for hours expended on the issue of the validity of the post-referendum injunction, which plaintiffs lost. Also, deductions were made from the pre-referendum fees for amounts spent by plaintiffs countering Carr's constitutional arguments, which were eventually ruled valid.

III. *Consideration of the "Special Circumstances" Issue*

The D.C. Circuit Court of Appeals generally affirmed the award of these attorneys' fees but asked this court to consider whether the "special circumstances" issue

changes the result. Under 42 U.S.C. § 1988, a district court must award attorneys' fees to the prevailing party in civil rights litigation unless special circumstances would render such an award unjust. *See Miller v. Staats*, 706 F.2d 336, 340 (D.C. Cir. 1983). In considering whether an award of fees is just, the court should consider whether the net result is such that it would be stretching the imagination to consider the result a victory in the sense of vindicating the rights of the fee claimants. "If the victory can fairly be said to be only a pyrrhic one, then an award of fees would presumably be inappropriate." *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 443 (D.C. Cir. 1982).

The Court of Appeals succinctly stated the District of Columbia's arguments for why assessment of attorneys' fees against it would be unjust:

> Apart from the unusual circumstance that the vote on the Rhodes Tavern initiative was ultimately declared unconstitutional, the District has also stressed its uniquely frustrating position in the litigation: it had no choice under District law but to issue the demolition permit once the conditions precedent were fulfilled. No matter which course it followed—granting or withholding the permit was acting unconstitutionally. In such a squeeze play, it argued, it would not be equitable to assess attorneys' fees against it. Finally, the District and intervenors argued that the Superior Court's holding that the initiative violated a *third party's* constituional rights, certainly constituted special circumstances.

Grano v. Barry, 783 F.2d at 1111 (emphasis in original).

In awarding the attorneys' fees, this court implicitly rejected the District's arguments without providing a thorough explanation. The matter is now on remand for this court to set forth its reasoning for concluding that special circumstances do not exist.

Since damages are not available in a civil rights action, one who succeeds in obtaining an injunction in the public interest should recover an attorneys' fee absent special circumstances. Such circumstances should be narrowly construed so as not to interfere with the congressional purpose of § 1988 of encouraging civil rights enforcement by plaintiffs acting as "private attorneys general." *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S. Ct. 2024, 2030-31 (1980). The burden of demonstrating the existence of special circumstances is on the defendant. *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *Mid-Hudson Legal Servs., Inc. v. G & U, Inc.*, 578 F.2d 34, 38 (2d Cir. 1978). This special circumstances limitation on § 1988 is applicable only to unusual circumstances. *See Riddell v. National Democratic Party*, 624 F.2d 539, 544-45 (5th Cir. 1980) ("special circumstances" only exist where the § 1983 claim is really a private state law tort claim or where plaintiffs' efforts did not really contribute to the result achieved).

In this case, this court did take into account special circumstances in not assessing fees against intervenor Carr (where Carr was simply protecting his own constitutional rights) and in not assessing fees against the District for plaintiffs' efforts in opposing Carr's constitutional arguments. No special circumstances exist, however, with regard to the District's unsuccessful effort to thwart the right to vote on the Rhodes Tavern referendum to the class of voters plaintiffs represented.

The relief sought by plaintiffs in obtaining the injunction was met: Rhodes Tavern was not demolished prior to the referendum. Therefore, plaintiffs' action secured for the electorate the opportunity to be heard in a meaningful manner. The fact that the outcome of the referendum was eventually declared unconstitutional is irrelevent (just as it would be irrelevant if the result of the referendum ran contrary to plaintiff's position). The Court of Appeals recognized this when it said:

> Although (plaintiffs') goal of ensuring that the result of the election would have legal effect was subsequently blocked in another court, they nonetheless succeeded in the aspect of their claims that brought them into federal court under section 1983.
>
> This case is consequently different from the line of cases holding that no fees are available for mere procedural victories.

783 F.2d at 1109.

The District was not forced to oppose plaintiffs' efforts for an injunction. The District would like to ascribe to itself the role of passive observer who had before it the no-win option of issuing validly-sought demolition and construction permits or of preserving a validly-sought public referendum initiative. Actually, the District could have sought a declaratory judgment regarding the constitutional rights of plaintiffs and of Carr. Further, the District could have delayed issuance of the permits pending the outcome of the referendum once the Board of Elections and Ethics had accepted and certified the initiative to appear as Initiative 11 at the next regularly-scheduled election. The prejudice to Carr's constitutional rights in waiting eight months until the election would have been much less than the prejudice to plaintiffs' rights in having the Rhodes Tavern demolished prior to the referendum. Instead, the District chose to fight against plaintiffs' efforts to obtain an injunction and then chose to seek an expedited appeal when the injunction issued. The District lost both efforts. The District's good faith in adopting an unconstitutional policy does not constitute a "special circumstances". *See, e.g., Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 643 F.2d 1034, 1040-41 (5th Cir. 1981). The Superior Court's holding that the referendum violated a third party's constitutional rights does not constitute a special circumstance. What the Superior Court held was that the outcome of the referendum violated Carr's constitutional

rights. It did not hold that had the District withheld the permits pending a declaratory judgment or pending the outcome of the referendum, then that would have violated Carr's constitutional rights. That issue, which balances two sets of constitutional rights (the right to vote and the right to due process) was not before the Superior Court since the referendum had already occurred.

29 U.S.C. § 1988 protects not just racial minorities or issues of "national impact," as suggested by the District. Rather, it seeks to encourage suits which vindicate § 1983 rights. The right to vote is a fundamental civil right, regardless of the subject matter involved and regardless of whether it is a state or national election. Only in rare instances should a court deny fees to a party who successfully secures a right to vote through § 1983 that otherwise would not have meaningfully existed. The District was a named party in this action against whom the injunction issued to prevent action that would have stripped plaintiffs of this constitutional right. No special circumstances exist such that plaintiffs should not be awarded attorneys' fees for vindicating this right.

IV. *Reconsideration of the Calculation of the Attorneys' Fees*

The court of appeals asks this court to reconsider its calculation of attorneys' fees. This court initially deducted from the amount owed by the District all fees for work by plaintiffs related to the constitutionality of the referendum, but deducted no fees for work related to the validity of the referendum under D.C. local law. The court of appeals remanded to reconsider whether the fees for work related to local law issues should be excluded as well. 783 F.2d at 1113.

This court thinks not. The reason for deducting the fees related to plaintiffs' opposition to Carr's constitutional claims was that the ultimate decision of the D.C. courts was that the initiative was invalid as a violation

of Carr's rights. This precluded a finding that plaintiffs were the "prevailing party" on this issue in any meaningful sense. Since fees were not properly assessable against Carr, neither could the District be assessed for plaintiffs' work opposing Carr. It was the District itself, however, and not Carr, that argued that the referendum was not proper for a vote under the District's Initiative and Referendum statute. The District compelled plaintiffs to devote time to opposing that argument. The injunction issued and an expedited appeal was not heard in part because plaintiffs successfully countered the District's argument. The Superior Court never found that argument valid. An award of fees for work on this local law issue is reasonable and fully within this court's discretion.

V. *Interest and Additional Awards*

Plaintiffs are entitled to interest on this court's award of $53,579.47 pursuant to 28 U.S.C. § 1961(a), at a rate of 9.17%. For the year of February 16, 1985 to February 15, 1986, the amount of interest accumulated on the judgment is $4,913.23. This interest will continue to accumulate from February 15, 1986 at a rate of $14.70 per day until the payment is made by the District.

Plaintiffs have also prevailed in their efforts to save their attorneys' fees on appeal and on remand. Plaintiffs are entitled to attorneys' fees for these efforts. After careful review of the time spend by plaintiffs' counsel in researching and preparing for the appeal and remand, this court finds that the attorneys' fees and expenses sought by plaintiffs are reasonable. Those fees are $20,926.00 and expenses are $247.57.

VI. *Conclusion*

On remand from the court of appeals, this court finds that no special circumstances exist such that plaintiffs' award of attorneys' fees should be vacated. Further, no deduction from this award is appropriate for work done

by plaintiffs in challenging the District's local law arguments. Plaintiffs shall receive interest on that judgment until such time as payment is made by the District. The award of additional attorneys' fees and expenses is justified for plaintiffs' efforts in defending this court's ruling on appeal and in filing supplemental papers with this court on remand.

An appropriate Judgment and Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2225

JOSEPH N. GRANO, *et al.*,

Plaintiffs,

v.

MARION S. BARRY, *et al.*,

Defendants.

[Filed Feb. 13, 1985]

MEMORANDUM

This matter comes before the court on plaintiffs' motion for an award of attorney's fees pursuant to 42 U.S.C. § 1988, and the opposition of defendants and defendant-intervenors thereto. Plaintiffs seek fees for work relating to an injunction they obtained from this court on September 1, 1983 to prevent defendants from issuing a permit to allow the demolition of the Rhodes Tavern pending the outcome of a public initiative which was designed to assure the preservation of the tavern. For reasons discussed herein, plaintiffs' motion shall be granted in part and denied in part.

I. *Background*

This action is perhaps the final chapter in the protracted battle to save the Rhodes Tavern, an historic building which, until it was razed on September 10, 1984, was located at the corner of 15th and F Streets, Northwest, in Washington, D.C. Enough has been written on

the history of the tavern and the litigation surrounding efforts to preserve it that no effort will be made to summarize those events here except to the extent necessary to discuss the narrow issue of whether plaintiffs are entitled to their attorney's fees for the injunction issued by this court and the subsequent appeal of that Order.

Plaintiffs brought the underlying suit under 42 U.S.C. § 1983 to prevent defendants from issuing a permit allowing demolition of Rhodes Tavern, pending the outcome of an initiative which had been certified for inclusion on the ballot in the November 8, 1983 elections. In granting the injunction sought by plaintiffs, the court held that issuance of a demolition permit by defendants to Oliver Carr, who intervened in this action as a defendant, would unconstitutionally deprive plaintiffs of their right to a meaningful and effective vote under the first amendment to the United States Constitution. *See Grano v. Barry*, No. 83-2225, slip op. at 10 (D.D.C. Sept. 1, 1983). The court enjoined the District of Columbia from issuing the demolition permit until after the vote on Initiative 11 and, if the initiative was approved by the voters, until the procedures contemplated in Initiative 11 for the preservation of Rhodes Tavern were concluded. *See Grano v. Barry*, 83-2225 (D.D.C. Sept. 1, 1983) (Judgment and Order).

After rejecting defendants' motion for expedited consideration of their appeal of this court's Order, the court of appeals ruled that the occurrence of the election rendered the first amendment issues moot and declined to rule on the propriety of the court's pre-election injunction. The court of appeals did, however, vacate the post-election injunction, holding that there remained no federal jurisdiction to support a continuing injunction after the election had been held. *See Grano v. Barry*, Nos. 83-1975 and 83-1976, slip op. at 2-3, 10 (D.C. Cir. May 4, 1984).

Because the initiative was voted upon and approved by the voters, plaintiffs contend that they prevailed in their action to preserve the electorate's right to vote, and that they are entitled to their attorney's fees for the injunction they obtained, as well as fees for defending that injunction on appeal. Defendants argue that plaintiffs never prevailed on the merits because the holding of this court was premised on a balancing of the rights of defendant and defendant-intervenor against those of plaintiffs, rather than a finding that issuance of the demolition permit itself constituted a violation of plaintiffs' right to vote. Further, they point out that because the court of appeals held that the occurrence of the election mooted the "right to vote" issue, there was never a final adjudication on the merits regarding plaintiffs' constitutional claims for which they seek attorney's fees under section 1988. Finally, defendants contend that plaintiffs are not entitled to fees for time devoted to defending the validity of the initiative because plaintiffs did not ultimately prevail on that issue.[1] Because the initiative was ultimately held unenforceable, defendants claim, the injunction obtained was insignificant, making an award of fees for the "right to vote" issue unwarranted.

II. *Discussion*

A. Fees Against Intervenor

Regardless of plaintiffs' status as a "prevailing party" for purposes of section 1988, the court holds that it would be inappropriate to hold the intervenors liable for plaintiffs' attorney's fees in this matter, particularly in light of Carr's ultimate success in arguing that passage

[1] Initiative 11 was held to constitute a violation of Carr's fifth amendment rights to due process and equal protection by Judge John Doyle of the Superior Court of the District of Columbia on August 20, 1984, just prior to the demolition of the tavern. *See Citizens Committee to Save Historic Rhodes Tavern v. Barry*, No. 6833-84, transcript at 20 (D.C. Super. Ct. Aug. 20, 1984).

of the initiative violated his rights under the fifth amendment. In one sense, the intervenors' posture in this action was similar to that of plaintiffs, in that both intervenors and plaintiffs were involved in this litigation to protect their rights under the Constitution, and the positions of both intervenors and plaintiffs on the constitutional issues were ultimately vindicated. This case is thus distinguishable from *Decker v. United States Department of Labor*, 564 F. Supp. 1273 (E.D. Wis. 1983), where the court imposed fees on a defendant-intervenor who raised unmeritorious civil rights defenses. *Id.* at 1280. Therefore, the court will decline to exercise whatever discretion it may have to award attorney's fees against the intervenors. The remaining discussion will focus solely on the fees it is appropriate to award against the District of Columbia.

B. "Right to Vote" Issue

Defendants' attempt to argue that plaintiffs did not prevail on their claim that issuance of the demolition permit would have violated their right to vote are unavailing. As the court pointed out in its Memorandum in enjoining defendants from issuing the permit,

> [T]he destruction of the Rhodes Tavern would not merely burden or impair plaintiffs' right to vote, but would abrogate it altogether. A vote to save the Rhodes Tavern would be an empty gesture, devoid of meaning or effect, if the Rhodes Tavern itself were allowed to disappear.

Grano v. Barry, No. 83-2225, slip op. at 10 (D.C.C. Sept. 1, 1983). The voters of the District of Columbia clearly had the right to place the initiative on the ballot. Once the initiative was on the ballot, the court held that the government could not deprive the electorate of the right to cast a meaningful vote on the fate of the Rhodes Tavern. That right would have been abrogated by issuance of a demolition permit by the District of Columbia. Regardless of the wisdom of the initiative or even

its ultimate validity, plaintiffs' action secured for the electorate the opportunity to be heard on an issue considered by many to be a matter of important public policy, as witnessed by the fact that a majority of the voters approved the initiative. As the Superior Court for the District of Columbia held in issuing a preliminary injunction against issuance of a demolition permit following the passage of Initiative 11,

> [I]n a very real sense the plaintiffs represent the citizens of the District of Columbia, or at least the voting majority that passed the Rhodes Tavern Act. Indeed, had the District of Columbia taken a more capacious view of that Act—one that we think is merited—it would be aligned with the Citizens' Committee against issuance of the demolition permit, not the developers.

Citizens Committee to Save Historic Rhodes Tavern v. Barry, No. 6833, slip op. at 29 (D.C. Super. Ct. June 29, 1984). Therefore, in recognition of plaintiffs' vindication of the electorate's first amendment rights in this matter, the court shall award plaintiff its fees for hours expended obtaining the injunction to prevent defendants from issuing the demolition permit prior to the November 1983 election.

The court shall also award fees for hours expended on the motion for expedited consideration of the appeal of this court's injunction to the United States Court of Appeals for the District of Columbia Circuit, and for hours expended subsequent to the passage of Initiative 11 regarding the right to vote issue. The court of appeals' rejection of defendants' request to rule on the appeal prior to the election effectively decided the right to vote issue in plaintiffs' favor. Although the court of appeals ultimately never ruled on the right to vote because it was deemed moot after the election had been held, the absence of a final adjudication on the merits does not preclude this court from awarding fees for plaintiffs'

success in obtaining the desired relief for the pertinent time period. *See Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981).

C. Other Issues

Plaintiffs clearly were not the prevailing party on the issue of the validity of the post-election injunction granted by this court. Therefore, no fees shall be awarded for hours expended on that issue, either before this court or on appeal. Plaintiffs do contend, however, that time spent arguing the validity of the initiative before this court and the court of appeals is compensable because the court of appeals accepted plaintiffs' argument that the federal courts were not the appropriate fora to determine the validity of the initiative. Even if plaintiffs can be deemed to have prevailed on the basis of this narrow holding, the ultimate decision of the District of Columbia courts that the initiative was invalid as a violation of the constitutional rights of the intervenors precludes a finding that plaintiffs were the "prevailing party" on this issue in any meaningful sense. Therefore, although the subsequent proceedings in the local courts may bear little relevance to plaintiffs' success on the right to vote issue, those proceedings shed considerable light on other issues on which time was expended before this court and the court of appeals, and plaintiffs' fee request will be reduced accordingly.

D. Amount of Fees

Plaintiffs seek fees totalling $42,893.75 for 572.35 hours spent on the merits of their case before this court and the court of appeals, $15,050 for 211.4 hours spent on their attorney's fees requests, and $1,169.70 for expenses. The lodestar figures represent the established billing rates for attorneys and clerks at the firm which represented plaintiffs, multiplied by the total hours for

which compensation is requested.[2] Although plaintiffs seek an "enhancement" both for risk and for quality of representation, they concede that such a premium is appropriate only in the exceptional case. *See Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 28-29 (D.C. Cir. 1984). Given the reservations expressed in *Laffey*, the court will decline to exercise its discretion to add a premium to the fees awarded against the District of Columbia.

As discussed *supra*, the court has determined that plaintiffs should not be awarded fees for time spent litigating the constitutional validity of Initiative 11. At the court's request, plaintiffs have estimated the value of the time spent on that issue at $3,967.50. After analyzing the memorandum filed by plaintiffs in support of that estimate, the court has concluded that that figure fairly represents the value of the hours expended on that issue. After carefully reviewing plaintiffs' itemization of time spent on the merits, the court finds plaintiffs' hours to be sufficiently documented and not excessive. Therefore, plaintiff shall be awarded the full amount requested, less the $3,967.50 reduction for time on the issue of constitutional validity, for a total award of $38,926.25 on the merits.

Similarly, the hours in plaintiffs' fee requests which were spent arguing that they were entitled to compensation for the portion of the litigation on the merits relating to the validity of the initiative is also not compensable. Therefore, the court shall reduce the amount requested for time devoted to the issue of attorney's fees by nine percent, which is the same proportion by which

[2] *See* Plaintiffs' Supplemental Memorandum on the Effect of *Laffey v. Northwest Airlines, Inc.* on the Attorney's Fee Award Here, Schedule A. Plaintiffs are not seeking compensation for 216.8 hours. *Id.* Plaintiffs have also made a reduction in hours claimed for time spent on the appeal of the post-election injunction issued by this court. *See* Plaintiffs' Concluding Memorandum at 5.

plaintiffs' time on the merits was reduced.[3] Having determined that plaintiffs' request for fees on the attorney's fee issue is otherwise appropriate, plaintiffs shall be awarded a total of $13,695.50 for time expended on the issue of attorney's fees.

Regarding the expenses claimed by plaintiffs, the court finds that, for the most part, they constitute reasonable out-of-pocket expenses incurred by plaintiffs' attorney which are normally charged to fee-paying clients in the course of providing legal services, and thus may appropriately be awarded against defendants under section 1988. *See Laffey*, 746 F.2d at 30. Because the court deems the copying expenditures excessive, however, the $845.42 in copying costs will be reduced by twenty-five percent, or $211.35, for a total award for out-of-pocket expenses of $957.72.

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

[3] The $3,967.50 reduction on the merits represents a nine percent reduction of the $42,893.75 sought by plaintiffs. The court deems it appropriate to reduce plaintiffs' time on the fee request by the same proportion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2225

JOSEPH N. GRANO, JR., *et al.*,
Plaintiffs,
v.
MARION S. BARRY, JR., Mayor,
District of Columbia, *et al.*,
Defendants.

[Filed Sept. 1, 1983]

MEMORANDUM

This matter came before the court on the cross-motions for summary judgment of plaintiffs and intervenors and on the motion to dismiss of defendants. Plaintiffs request that this court enjoin the defendants from issuing a permit allowing demolition of the Rhodes Tavern, an historic building at the corner of 15th and F Streets, Northwest, pending a vote next November on a public initiative designed to assure the Rhodes Tavern's preservation. For the reasons set forth below, plaintiff's motion is granted and those of defendants and intervenor are denied.

Facts

This action is yet another chapter in the protracted battle to save the Rhodes Tavern. It was built between 1799 and 1801 and is the oldest existing commercial structure in downtown Washington, D.C. In 1977 intervenor Oliver T. Carr, Jr. began exploring the possibility of developing the downtown block bounded by 14th, 15th, F and G Streets, N.W., an area which included not only the Rhodes Tavern but also the Keith's Theater and Albee Building (Keith-Albee) and the National Metro-

politan Bank Building (the Bank). All three buildings are classified within Category II under the District of Columbia Historic Landmark and Historic District Protection Act of 1978, D.C. Law 2-144, D.C. Code § 5-1001 *et seq.* (1981), meaning they are buildings of importance which should be preserved or restored.

After retaining an architect to draw up several alternative projects for the site, Carr began extensive negotiations with citizens groups concerned with the buildings' preservation. The negotiations resulted in an agreement whereby Carr would preserve parts of the Keith-Albee and Bank buildings, and either donate Rhodes Tavern to a non-profit group for relocation or demolish it.

Carr then applied for necessary permits, including one for the demolition of Rhodes Tavern. Pursuant to the local historic preservation law, a representative of the mayor held three days of public hearings in December 1979 to determine if the Carr project were one of special merit, the finding necessary to permit the destruction of a Category II landmark such as the Rhodes Tavern. In February 1980 the mayor's representative made the required finding and ordered that the permits be issued. A local citizens group petitioned for review, and the D.C. Court of Appeals upheld the order of the mayor's representative in May 1981. *Citizens Committee to Save Historic Rhodes Tavern v. District of Columbia Dept. of Housing and Community Development*, 432 A.2d 710, *cert. denied*, 454 U.S. 1054 (1981).

Under D.C. Code § 5-1004(h) no demolition permit may be issued unless a construction permit for the development is issued simultaneously. And no construction permit may issue until the Commission of Fine Arts approves the plans and working drawings for the proposed construction. On April 15, 1983 Carr submitted his application for a construction permit, along with his plans and drawings. The Commission of Fine Arts approved the project on May 16, 1983.

Earlier, in 1979, Carr had applied to the D.C. Board of Zoning Adjustment ("BZA") for a variance to allow construction of a nonconforming roof structure. The BZA denied the application in January 1980. In January 1983 Carr resubmitted his application. After a public hearing in March, the BZA granted the exception, issuing its written decision on August 2, 1983, the decision to take effect ten days thereafter. Once the BZA decision took effect, no further obstacle would remain to the issuance by the District of Columbia of the permit for the construction of the Carr project and the demolition of the Rhodes Tavern.

Plaintiffs brought this action to block issuance of the permits pending the vote of Initiative 11 set for November 8, 1983. The purpose of Initiative 11 is to encourage the preservation and restoration of the Rhodes Tavern. It is the culmination of many months of effort by plaintiff Grano and others under the District of Columbia law which allows city-wide votes on initiatives and referenda. Under the law, codified at D.C. Code § 1-1320, any qualified elector who desires to submit a proposed initiative to voters in the District of Columbia may file the proposal with the Board of Elections and Ethics. Upon receipt of the proposal the Board prepares it in proper legislative form and, after copies are printed by the proposer, the Board certifies that the petition form complies with the law. The initiative proponents then have 180 days to gather the requisite number of signatures.

When the signed petitions are presented to the Board, the Board "shall refuse to accept the petition if the Board finds that the measure presented is not a proper subject for initiative or referendum, whichever is applicable, under the terms of Title VII of the District of Columbia Self-Government and Governmental Reorganization Act . . . ." D.C. Code § 1-1320(k)(1). If a petition is refused, the proponents may appeal the Board's decision to the D.C. Superior Court. If the

Board accepts a petition it has 30 days to verify the signatures and certify the initiative as qualified for replacement on the ballot.

In this case, plaintiff Grano submitted the text of a proposed initiative to the Board on July 23, 1982. Grano Aff. § 4. On August 4, 1982, the Board approved the subject matter of the initiative as proper under D.C. Code § 1-1320. Two weeks later the Board approved the initiative's format. On February 14, 1983 Grano submitted to the Board petitions in support of the initiative containing 23,578 signatures. On March 28, 1983 the Board voted unanimously to accept and certify the initiative to appear as Initiative 11 on the ballot at the next regularly-scheduled election. That election is set for November 8, 1983.

Initiative 11 is in several parts. It would declare the public policy of the District of Columbia to be to promote the preservation and restoration of the Rhodes Tavern. To this end, the initiative would establish an Advisory Board to negotiate with the owners of the Rhodes Tavern to reach an agreement to preserve it. Failing that, the Advisory Board would prepare a report for the mayor outlining alternative actions to reach the same objective. At the same time the Advisory Board would prepare reports for the mayor and Council concerning the history of the Rhodes Tavern and how it could be preserved, restored, and put back to use. Finally, the initiative would direct the Advisory Board to prepare an application nominating the Rhodes Tavern as a Category II landmark.

Plaintiffs brought their complaint on August 3, 1983. At what was to be a hearing on plaintiffs' application for a temporary restraining order, defendants agreed not to issue the demolition permit for the Rhodes Tavern pending decision by this court in this case. The court set a hearing on plaintiffs' motion for a preliminary injunction, but the parties then moved jointly under Fed. Rule Civ. Pro. 65 that the hearing be on the merits of the case.

Discussion

Plaintiffs ask this court to enjoin the issuance by the District of Columbia of a permit to demolish the Rhodes Tavern pending the outcome of the vote on November 8 on Initiative 11. The District has completed its administrative review of all necessary permit applications and, absent an injunction from this court, a demolition permit could be issued at any time. If a permit is issued, say plaintiffs, Carr will demolish the Rhodes Tavern. To destroy the Tavern before the election, argue plaintiffs, would deprive plaintiffs of their right to vote on the question of its preservation, thereby infringing their First Amendment rights to a meaningful and effective vote.

Defendants and Carr argue that the initiative, if enacted, would be an exercise of administrative power not properly a subject of the initiative process and, in addition, an unconstitutional invasion of Carr's property rights. Moreover, says Carr, the mere certification of an initiative for the ballot creates no constitutional rights in plaintiffs which would be violated by issuance of the demolition permit.

Carr's characterization of plaintiffs' rights is mistaken. The right to vote is a fundamental right guaranteed by the Constitution, *Reynold v. Sims*, 377 U.S. 533 (1964), and grounded in the First Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968). The constitutional guarantee of the right to vote includes the right to vote effectively. The right to vote may not, of course, be denied outright; nor may it be diluted. *Reynolds v. Sims, supra*, at 554. As the Supreme Court wrote in *Williams v. Rhodes, supra*, the Constitution protects

> two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast votes effectively.

393 U.S. at 30.

The guarantee of the right to an effective vote has been restated in numerous ballot access cases, such as *Illinois Election Board v. Socialist Workers Party*, 400 U.S. 173 (1979), where the Supreme Court struck down an Illinois law requiring independent candidates and new parties to obtain more signatures to appear on the local ballot in Chicago than to appear on the ballot in statewide elections. After quoting the above-cited passage from *Williams v. Rhodes*, the court wrote:

> The freedom to associate as a political party, a right we have recognized as fundamental, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences.

440 U.S. at 184.

The protection the Constitution affords the right to vote is not limited, however, to ensuring the access of particular candidates or parties to the ballot. The First Amendment also protects the right to vote on an initiative. *Kirksey v. City of Jackson, Mississippi*, 663 F.2d 659, 662 (5th Cir.), *clarified, reh. denied*, 669 F.2d 316 (1981). An initiative or referendum is the direct exercise by the people of the legislative power they have reserved to themselves. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976). As described by the District of Columbia Court of Appeals, under the local initiative law "the power of the electorate to propose laws through the initiative process is coextensive with the legislative branch." *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, 441 A.2d 871, 876 (D.C. App. 1980). The initiative or referendum is also one means by which citizens may exercise their "unquestioned right to petition their government to redress of what they believe are grievances." *Diaz v. Board of County Commissioners of Dade County*, 502 F. Supp. 190, 193 (S.D. Fla. 1980). In sum, as the *Kirksey* court wrote in reviewing the results of a referendum:

> At the core of first amendment values is the right to espouse political views and to associate for political purposes. Inherent in this guarantee is the sanctity of the ballot.

663 F.2d at 662 (citations omitted).

The importance of the initiative process in the District of Columbia was recognized by the court in *Citizens Against Legalized Gambling v. District of Columbia*, 501 F. Supp. 786 (D.D.C. 1980), where the court rejected an attempt to remove an initiative from the ballot. Plaintiffs argued that the ten days during which petition signatures were posted for public inspection were inadequate to allow them to fully exercise their rights to political participation in opposition to legalized gambling. The court rejected the plaintiffs' reliance on the ballot access cases, writing:

> Plaintiffs are not concerned with *increasing* voters' opportunity to consider alternative candidates or positions; plaintiffs want to *restrict* determination of an issue by the voters. This is particularly inappropriate in the case of an initiative. Initiative legislation should be liberally construed to extend its operation rather than to reduce it.

501 F. Supp. at 789.

In both *Citizens Against Legalized Gambling* and *Diaz* courts rejected attempts to remove an initiative from the ballot before the election. In this case defendants and intervenors do not seek to have Initiative 11 removed from the ballot. However, they are pursuing a course of which, if unchecked, will rob plaintiffs of their right to a meaningful vote just as much as if the initiative itself

were removed from the ballot. Unless issuance of the permit is enjoined the Rhodes Tavern will be demolished. In *Williams v. Rhodes, supra*, the Supreme Court struck down a measure keeping a political party off the ballot because it "diminished [the] practical value" of the right to vote of that party's supporters and "impair[ed] the voters' ability to express their political preferences." 440 U.S. at 184. But in this case, the destruction of the Rhodes Tavern would not merely burden or impair plaintiffs' right to vote, but would abrogate it altogether. A vote to save the Rhodes Tavern would be an empty gesture, devoid of meaning or effect, if the Rhodes Tavern itself were allowed to disappear.

Defendants and Carr argue vigorously that the proposed initiative is invalid under the local statute and unconstitutional and that, accordingly, no injunction should issue. Neither the validity nor the constitutionality of the initiative, however, may properly be resolved by this court at this time. Those issues will be ripe for adjudication only if the initiative in fact passes in November and becomes law. At that time intervenors could, if they chose, bring suit to challenge the law. As the court wrote in *Diaz, supra*:

> The petition for an injunction must also be denied because the issue of the proposal's constitutionality is not yet ripe for a decision. Courts avoid hypothetical questions and will not make a declaration of unconstitutionality when it is not necessary.
>
> The plaintiffs here have ably argued that the proposed ordinance, if enacted, could violate constitutional rights. That is possible. It is also possible, however, that the voters of Dade County will not approve the proposal, or that county officials will correctly interpret the ordinance, if enacted only in ways which do not violate the constitutional rights of interested parties. It is simply too early to tell.

502 F. Supp. at 193 (citations omitted).

This prudential refusal to decide unripe questions is of particular force when the result sought is, in effect, the removal of a political issue from the electorate's consideration. As the court explained in *Diaz*:

> Other constitutional rights conceivably can require interference with a referendum, but only in the most exceptional circumstances. The judicial branch of government properly hesitates to prevent citizens from voting on matters raised by an exercise of the constitutional right to petition the government. To do otherwise would be to enter a political thicket studded with constitutional thorns.
>
> The right to vote is the very essence of democracy. A candidate or issue on the ballot should almost always stay there. Thus, an election may only be enjoined when an immediate and irreparable violation of constitutional rights could not otherwise be prevented. In this action, the plaintiffs claim they will be damaged by the *results* of the referendum; they will not be damaged by the act of voting itself.

Id.

Carr argues that *Diaz* is distinguishable because to enjoin issuance of the demolition and construction permits will impose on him the costs of the delay in construction until the November election. The court has carefully weighed the claimed burden upon intervenors against the unavoidable vitiating of plaintiffs' right to vote in the absence of injunctive relief and finds that the circumstances of this case merit adherence to the rule of prudence. Carr has pursued the development of this property for six years; the election is scarcely ten weeks away. Moreover, before Carr received the final necessary discretionary permits from the District of Columbia to allow him to proceed with the development, Initiative 11 had been certified for the November ballot. Carr's own actions have contributed to the delays which have given plaintiffs the opportunity to bring the question of

the future of the Rhodes Tavern to the electorate as a whole through the initiative process. The right to participate effectively in that process, must be protected. Accordingly, the court shall enjoin the defendants from issuing any permit which would allow the destruction of the Rhodes Tavern pending the outcome of the vote on Initiative 11 in November.

An appropriate Judgment accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2225

JOSEPH N. GRANO, JR., *et al.*,
Plaintiffs,

v.

MARION S. BARRY, JR., *et al.*,
Defendants.

[Filed Aug. 27, 1986]

ORDER AND JUDGMENT

This matter comes before the court on remand from the D.C. Circuit Court of Appeals. For the reasons stated in the accompanying Memorandum filed by the court this date, it is, by the court, this 27th day of August, 1986,

ORDERED, ADJUDGED AND DECREED that the award of attorneys' fees against defendant as issued by this court February 13, 1985, is reaffirmed; and it is further

ORDERED, ADJUDGED, AND DECREED that an additional award of attorneys' fees and expenses against defendant is granted in the amount of $21,173.57; and it is further

ORDERED, ADJUDGED, AND DECREED that plaintiffs are entitled to interest on the February 15, 1986 judgment in the amount of $4,913.23 plus $14.70 per day from February 16, 1986 to the date defendant makes payment on the judgment.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2225

JOSEPH N. GRANO, *et al.*,
Plaintiffs,

v.

MARION S. BARRY, *et al.*,
Defendants.

[Filed Feb. 13, 1985]

ORDER AND JUDGMENT

This matter comes before the court on plaintiffs' motion for attorney's fees and the opposition of defendants and defendant-intervenors thereto. For reasons explained in the accompanying Memorandum filed by the court this date, it is, by the court, this 12th day of February, 1985,

ORDERED plaintiffs' motion for an award of attorney's fees against the defendant-intervenors is denied; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for an award of attorney's fees against defendants is granted in the amount of $53,579.47.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 83-2225

JOSEPH N. GRANO, JR., *et al.*,
Plaintiffs,

v.

MARION S. BARRY, *et al.*,
Defendants.

[Filed July 12, 1984]

JUDGMENT AND ORDER

Pursuant to the judgment of the United States Court of Appeals for the District of Columbia Circuit entered May 4, 1984, in Nos. 83-1975 and 83-1976, it is, by the court, this 12th day of July, 1984,

ORDERED, ADJUDGED and DECREED that the judgment granting plaintiffs' motion for summary judgment, entered herein on September 1, 1983, is vacated; and it is further

ORDERED, ADJUDGED and DECREED that the order enjoining the defendants, their agents and all persons acting in concert with them from issuing a demolition permit for the Rhodes Tavern and issuing a construction permit for the construction of an office building on its site until the procedures contemplated in Initiative No. 11 for the preservation of the Rhodes Tavern are concluded, said order having been entered herein on September 1, 1983, is dissolved; and it is further

ORDERED, ADJUDGED and DECREED that the complaint herein is dismissed.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2225

JOSEPH N. GRANO, JR., *et al.*,
Plaintiffs,

v.

MARION S. BARRY, *et al.*,
Defendants.

[Filed Sept. 1, 1983]

JUDGMENT AND ORDER

In accordance with the foregoing Memorandum, it is, by the court, this 1st day of September, 1983,

ORDERED, ADJUDGED and DECREED that intervenors' motion for summary judgment is denied; and it is further

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that defendants above-named, their agents and all person acting in concert with them, are enjoined from issuing a demolition permit for the demolition of Rhodes Tavern and issuing a construction permit for the construction of an office building on its site;

(1) until after the November 8, 1983 elections in the District of Columbia and the certification of the result of

the vote on Initiative No. 11; and, if the majority of the voters vote YES on Initiative No. 11 and it is enacted as the law of the District of Columbia, then

(2) until the procedures contemplated in Initiative No. 11 for the preservation of the Rhodes Tavern are concluded.

/s/ Thomas A. Flannery
United States District Judge

No. 87-1308

IN THE

Supreme Court of the United States

October Term, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

JOSEPH N. GRANO, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 87-1308

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

In this case, the District of Columbia Board of Elections duly certified for the ballot an initiative measure to preserve a historic building. App. 3a, 23a, 55a, 56a. District of Columbia voters were to vote on the measure on November 8, 1983. Id. Petitioners, officials of the District of

Columbia government ("the District")[1/] could have intervened in the certification process before the Board of Elections, D.C. CODE §§ 1-1320(o) (formerly § 1-1320(p)(1)), 1-1312(o)(2), and could have brought suit to challenge the certification of the measure, Dankman v. District of Columbia Board of Elections and Ethics, 443 A.2d 507, 511 (D.D.C. 1981). They did neither.

Respondents, who were the proponents of the initiative, requested the District to postpone demolition of the historic building until the voters could express their will. Complaint, Grano v. Barry, No. 83-2225 (D.D.C.) ¶ 13. Faced with governmental silence, id., respon-

1/ The petition names the District of Columbia as a party. This is incorrect. The named defendants were the Mayor and two subordinate officials of the District of Columbia Government, sued in their official capacity. The District as a political body never intervened and is not a party eo nomine.

dents sued under 42 U.S.C. § 1983 for an injunction against issuance of a demolition permit on the ground that demolition would effectively deprive them and all District of Columbia voters of the right to vote on the initiative. App. 4a, 57a. The district court agreed, App. 57a-62a. It granted respondents' motion for summary judgment, "holding [as the D.C. Circuit described it, App. 24a] that [respondents'] right to vote would be violated were the permits for demolition and construction granted before the election."

The district court issued a permanent injunction against issuance of a demolition permit prior to the election, to continue, if the initiative passed, pending its implementation. App. 24a, 67a-68a. The District appealed, and the initiative passed while the appeal was pending. The D.C. Circuit held the

District's appeal moot as to the injunction against demolition before the election, App. 5a, 24a-26a. It vacated the injunction's continuance after the election for want of federal jurisdiction; once the citizens had voted and their right to an effective vote preserved by the injunction, no further constitutionally protected rights were in issue. App. 5a, 26a-29a. The District sought no review in this Court.

Respondents applied for attorney's fees under 42 U.S.C. § 1988. The district court held that respondents had prevailed in their suit to preserve the right to vote on the initiative, App. 48a-49a, and awarded attorney's fees. Id. 50a-51a. The District appealed. The D.C. Circuit agreed that respondents "clearly obtained a significant benefit when they succeeded in ensuring that the voting would take place while the Rhodes

Tavern still stood...." App. 8a, and ruled that respondents had prevailed for purposes of 42 U.S.C. § 1988. App. 18a. The D.C. Circuit remanded, however, for district court findings on the District's argument that exceptional circumstances would make an award of fees unjust. App. 13a-15a, 18a-19a. The District sought no review in this Court.

On remand the district court applied Supreme Court, D.C., Second and Eighth Circuit precedents to hold that "[n]o special circumstances exist ... with regard to the District's unsuccessful attempt to thwart the right to vote...." App. 40a. The District appealed again and the D.C. Circuit affirmed again.

The D.C. Circuit approved the district court's finding "that the plaintiffs' victory was not pyrrhic be-

cause they successfully secured for the electorate a meaningful right to vote; Rhodes Tavern was not demolished before the referendum." App. 33a. It approved the district court's holding that the District was not required to choose between competing constitutional claims, Pet. 16, for the District "was not a passive observer ... was not compelled to oppose plaintiff[s]" and "could have requested a declaratory judgment." App. 33a. The court of appeals rejected the District's attempt to relitigate the merits of the original permanent injunction, App. 34a. Finally, it rejected the District's claim that its "good faith" should absolve it from liability for fees. App. 34a-35a.

REASONS FOR DENYING THE WRIT

1.

This case has become a paradigm of the "second major litigation" over

attorney's fees that this court condemned in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The work on the merits of respondents' successful voting rights suit began in August 1983 and was completed with oral argument of the appeal in February 1984, App. 20a. For that work, the district court awarded $38,926.25 in attorney's fees. App. 51a. For respondents' attorney's work during the four years since, in opposing the District's repeated challenges to the district court's award of attorney's fees for the work on the merits, the district court has awarded $34,621.50, App. 43a, 51a, not counting work on the District's last appeal and this petition for certiorari, which will cost an estimated $15,000 to $20,000 more. Thus the time spent on fee litigation will considerably exceed the time spent on

the merits of this case, a result this Court has deplored.

Six court of appeals judges have considered and rejected the issues the District raises here on the merits (i.e. that the claims in plaintiffs' complaint for injunction "clearly do not state valid civil rights claims," Pet. 10 [emphasis in original]) and on attorney's fees: Judges Wald, Bork, Starr (App. 21a, 26a n. 2), Mikva and Silberman (App. 2a) of the D.C. Circuit Court of Appeals (App. 2a) and Judge Friedman of the Federal Circuit Court of Appeals (App. 30a). Surely these issues have consumed enough judicial resources; as we show below, they lack merit enough to have gone as far as the District has taken them already.

2.

The linchpin of the District's argument is that respondents' suit was not

a valid civil rights suit to preserve their right to vote in an upcoming election. Pet. 10. That issue became moot when the election took place and the citizens voted on the initiative. The District nevertheless continued to seek appellate review of the merits of the district court's grant of summary judgment to respondents and issuance of a permanent injunction respecting the November 1983 elections. App. 24a-26a, 11a, 34a.

The D.C. Circuit declined to revisit the merits, all three panels holding the issues moot. App. 24a-26a (noting in that first decision that the holding of mootness "is not dispositive as to the issue of attorney's fees," id. 26a n. 2), 11a-12a, 34a. However, on the six occasions that courts have ruled on the nature of respondents' underlying claim (three times in the district

court, three times on appeal) the courts have repeated their characterization of the suit as one to preserve the right of the citizens of the District of Columbia to vote in the November 1983 election on an initiative that had been validly certified for the ballot. App. 59a-60a, 48a-49a, 40a (District Court), 24a-26a, 8a-9a, 32a (Court of Appeals).

The District did not avail itself of its opportunity to seek this Court's certiorari review of the first appellate decision that held the issue moot (App. 20a-29a). It should not be permitted to do so now through the back door of its challenge to attorney's fees.

3.

It is now virtually black letter law under 42 U.S.C. § 1988, and other exceptions to the "American rule," that where a party obtains the relief he seeks by litigation, and it is clear

that the litigation itself was instrumental in obtaining the relief, entitlement to attorney's fees is not affected if the passage of time (as in this case) or voluntarily compliance by defendants renders further judicial proceedings, including appellate review, moot. See, e.g., Williams v. Alioto, 625 F.2d 845, 847-48 (9th Cir. 1980) (per curiam), cert. denied, 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir.), reh. denied, 627 F.2d 239 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981), cert. denied, 462 U.S. 1119 (1983); Bagby v. Beal, 606 F.2d 411, 414-15 (3rd Cir. 1979);[2/] Reiser v. Del Monte Properties Co., 605 F.2d 1135,

---

2/ Where, in a moot case in which attorney's fees were awarded the court of appeals declined to "do indirectly what we cannot do directly ... review the merits of the case in order to determine whether the appellee is entitled to receive reasonable attorney's fees under ... 42 U.S.C. § 1988," id. at 414.

1139 (9th Cir. 1979); Criterion Club of Albany v. Board of Commissioners of Dougherty County, Georgia, 594 F.2d 118, 120 (5th Cir. 1979) (voting rights case); Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974), cert. denied, 422 U.S. 1048 (1975).

Respondents' lawsuit and the permanent injunction they obtained prevented the destruction of the historic building and made it possible for the voters of the District of Columbia to vote on the initiative measure in November 1983. Hence respondents were a "prevailing party" by reason of the district court's decision. They did not lose prevailing party status when the election took place, mooting the District's appeal before it could be heard and decided. It is the District's argument, that relief by court order requires more

proof of the merit of a plaintiff's claims than voluntary compliance (Pet. 10-15), which would stand logic "on its head" and which "makes no sense." Pet. 15. As the Court of Appeals held, "when the party has prevailed as a direct result of a district court order accepting his civil rights claims on their merits, the issues of causation and colorability are clear, and the frivolousness test serves no purpose." App. 11a - 12a.

4.

The District claims that special circumstances make an award of fees unjust because they chose in good faith to favor the property owner's "right" to tear the building down, over the electorate's right to vote to enact a statute that would prevent it. Pet. 16-19.

a. That the local court later declared the enacted statute unconstitutional does not, even nunc pro tunc, justify the District's strenuous efforts to deny the voters an effective vote. As this court holds, the proper procedure is to allow the vote to take place. If the vote goes against the property owner, then the statute is ripe for challenge in the local courts -- which is what happened here, Pet. 17. City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 677 (1976).

b. Whatever "right" the property owner had to tear the building down could be abrogated by statute, see Penn Central Transportation Co. v. City of New York, 438 U.S. 104, reh. denied, 439 U.S. 883 (1978). It could be lawfully suspended pending the vote on a duly certified referendum (or initiative), County of Kauai v. Pacific Standard Life

Ins. Co., 653 P.2d 766, 775-76 (Haw. 1982), appeal dismissed, 460 U.S. 1077 (1983). The temporary delay in issuance of the permit would not have been ripe for suit by the owner for compensation (even if that would justify abridgement of the right to vote), Pet. 4, 17-19, not only until the voters had approved the initiative, see County of Kauai, but until the Congress had approved it, see App. 5a. Indeed it would not have been ripe until the statutory procedures were concluded, see Pet. 3, and a final decision whether and how to preserve the building reached under those procedures, see MacDonald, Sommer & Frates v. Yolo County, 477 U.S. ___, ___, 106 S.Ct. 2561, 2566-69, reh. denied, ___ U.S. ___, 107 S.Ct. 22 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, ___, 105 S.Ct. 3108, 3117-3122

(1985). Even then no suit for compensation would lie unless that final action denied the owner, permanently or temporarily, "all use of his property," First English Evangelical Lutheran Church v. Los Angeles County, ___ U.S. ___, 107 S.Ct. 2378, 2388-89 (1987),[3/] which landmark legislation ordinarily does not, cf. Penn Central, 438 U.S. at 130-31.

c. For the absurdity of the District's claim that respondents' suit did not involve the right to vote, Pet. 17, see App. 57a-60a.

d. The District's argument reduces to one that their perceived conflicting duties and good faith choice to side with the property owner (Pet. 18) constitute special circumstances that make an award of fees unjust. The argu-

3/ And "for a considerable period of years," 107 S.Ct. at 2389; at least six in that case, id. at 2388.

ment blows in the face of settled law. See, e.g., Wilson v. Stocker, 819 F.2d 943, 951 (10th Cir. 1987); Jones v. Wilkinson, 800 F.2d 989, 992 (10th Cir. 1986), aff'd, ___ U.S. ___, 107 S.Ct. 1559 (1987); J.J. Anderson Inc. v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir. 1985), and cases cited; Cunningham v. City of McKeesport, 753 F.2d 262 (3rd Cir. 1985), vacated and remanded, ___ U.S. ___, 106 S.Ct. 3324, reinstated, 807 F.2d 49 (3rd Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2179 (1987); In Re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610, 613 (10th Cir. 1984); Espino v. Besteiro, 708 F.2d 1002, 1005-06 (5th Cir. 1983); Miller v. Staats, 706 F.2d 336, 343 (D.C. Cir. 1983); Burke v. Gurney, 700 F.2d 767, 772 (1st Cir. 1983), and cases cited; Ellwest Stereo Theater, Inc. v. Jackson, 653 F.2d 954,

955 (5th Cir. 1981); Teitelbaum v. Sorenson, 648 F.2d 1248, 1250-51 (9th Cir. 1981); Riddell v. National Democratic Party, 624 F.2d 539, 545 (5th Cir. 1980); International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502, 504 (5th Cir. 1980); Brown v. Culpepper, 559 F.2d 274, 278 (5th Cir. 1977).

e. The District's professed bewilderment at how it could have sought a declaratory judgment, instead of opposing respondents' right to vote, is disingenuous. See, e.g., District of Columbia Board of Elections v. District of Columbia, 520 A.2d 671, 672 (D.C. 1986) (District sued the Board of Elections for declaratory judgment and injunction to eliminate overnight shelter initiative from the ballot); Ohio Ex. Rel. Celebrezze v. United States Dep't of Transportation, 766 F.2d

228, 232 (6th Cir. 1985) (state had standing to seek declaratory judgment regarding the constitutionality of its own statute).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

MARION S. BARRY, JR., MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. *v.* JOSEPH N. GRANO, JR., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1308. Decided March 21, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case presents the difficult issue whether attorney's fees may be awarded under 42 U. S. C. § 1988 when the defendant has involuntarily acquiesced in the plaintiff's demands—due to a preliminary injunction, for example—but the case is later mooted prior to completion of the appeal process. For the reasons given in my dissent from denial of certiorari in *Kay* v. *David Douglas School District*, —— U. S. —— (1988), I would grant certiorari in this case.